111-252

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 178.

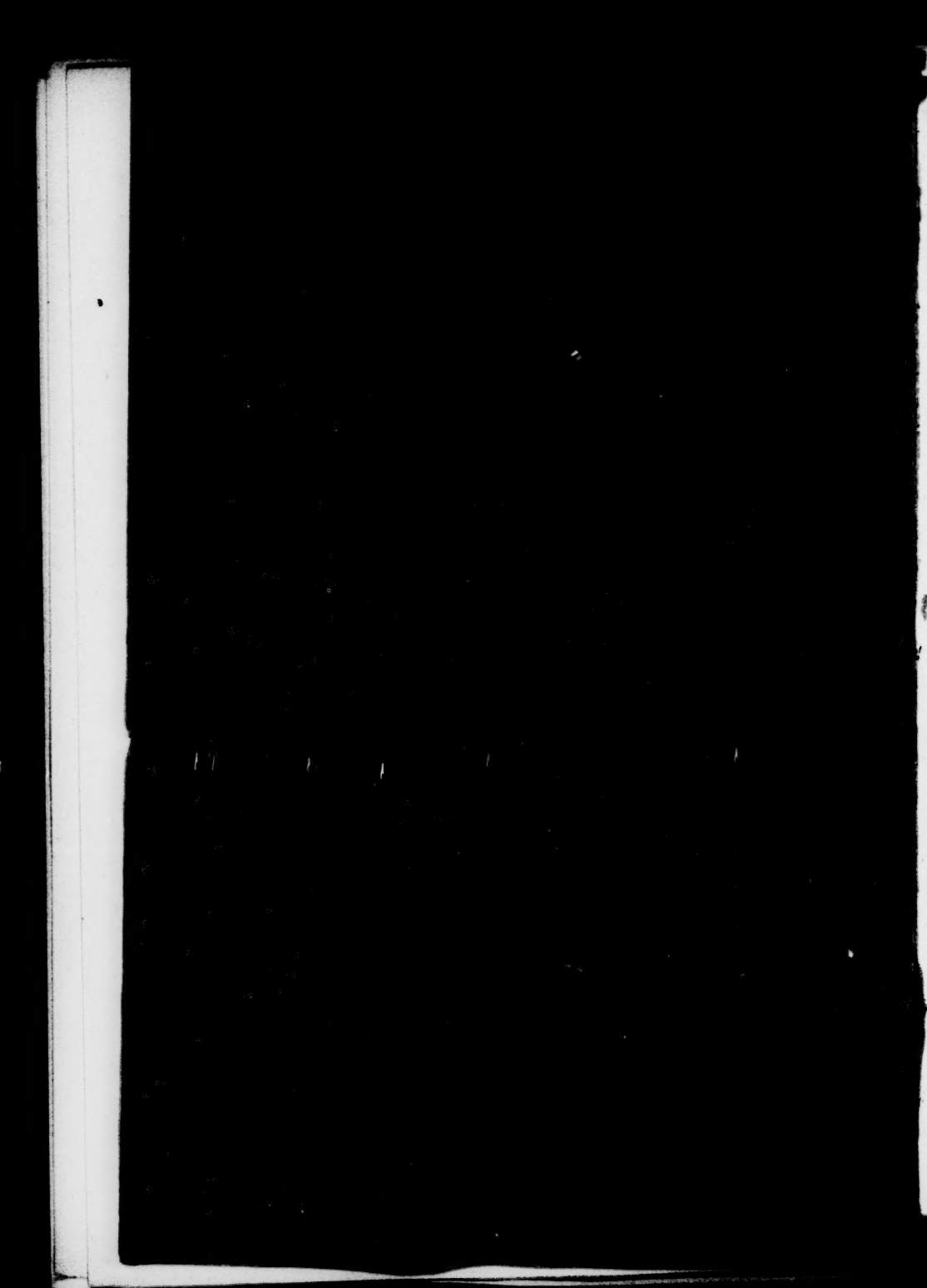
CHRISTIAN BÖRS, PLAINTIFF IN ERROR,

vs.

WILLIAM I. PRESTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 25, 1880.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 178.

CHRISTIAN BÖRS, PLAINTIFF IN ERROR,

vs.

WILLIAM I. PRESTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	2	1
Capias	4	2
Complaint	6	3
Answer	10	3
Reply	18	6
Verdict	19	6
Judgment	21	7
Bill of exceptions:		
Commission to Antwerp	24	7
Defendant's interrogatories	28	8
Instructions to commissioners	34	10
Deposition of August Nottlebohm	42	13
Deposition of I. Cantereels Van Aerven	47	14
Plaintiff's Exhibit 4 (Letter, Börs to Preston, April 10, 1876)	49	15
Plaintiff's Exhibit 5 (Letter, Preston to Börs, April 10, 1876)	49	15
Defendant's Exhibit 7 (Receipt)	51	16
8 (Receipt)	51	16
9 (Receipt)	52	16
10 (Receipt)	52	16
11 (Examination of Preston before trial in Supreme Court)	53	17
12 (Letter, Preston to Börs, January 31, 1879)	58	18
13 (Consent to use depositions)	59	19
C (Account of sales of lard)	61	19
E (Cablegram, Nottlebohm to Börs, April 8, 1876)	63	20
F (Cablegram, Nottlebohm to Börs, May 3, 1876)	63	20
G (Chemist's report)	64	20

	Original.	Print.
Bill of exceptions—Continued.		
Trial of cause; evidence for plaintiff:		
Testimony of Riley P. Wilson	68	22
Wm. J. Preston	114	40
Henry W. O. Edye	144	52
Levi Cook, jr	149	54
Testimony for defendant:		
Testimony of Auguste Walther	150	54
Frederick P. Forster	161	58
Nicholas Brandt	163	58
Edward L. Cohn	175	63
John V. Van Arsdale	178	65
George R. Henderson	178	65
Charles M. Stilwell	179	65
Martin Rouse	187	69
Henry DeMaziere	197	73
Riley P. Wilson, (recalled)	210	78
Henry DeMaziere, (recalled)	211	79
Riley P. Wilson, (recalled)	236	90
John T. Rouse	238	90
Requests of defendant to court to charge	242	92
Charge to the Jury	249	94
Testimony of R. P. Wilson, (recalled)	257	97
Testimony of Wm. J. Preston, (recalled)	257	97
Charge to the jury, continued	259	97
Defendant's exceptions to judge's charge	258	97
Verdict of jury	260	98
Assignment of errors	262	98
Bond on writ of error	265	99
Citation	267	100
Proof of service	268	100

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Christian Börs and William I. Preston, a manifest error hath happened, to the great damage of the said Christian Börs, as is said, and as appears by his complaint: We being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next; that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of September, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

[SEAL.] JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

2 (Indorsed:) U. S. circuit court. William I. Preston, def't in error, vs. Christian Börs, pl'ff in error. Writ of error. John A. Weekes, att'y for pl'ff in error, No. 58 Wall st., New York.

The within writ allowed Sept. 6th, 1880.

SAM'L BLATCHFORD,
Circuit Judge.

Due and timely service of the within writ of error is hereby admitted, this 7th day of September, 1880.

B. F. TRACY,
Att'y for Def't in Error.

(Stamp:) U. S. circuit court. Filed Sep. 7, 1880. John I. Davenport, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Joseph M. Deuel, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify
3 that the following pages, numbered from four to two hundred

sixty-eight, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Christian Börs, plaintiff in error, against William I. Preston, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this sixth day of October, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the said United States the one hundred and fifth.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

4 *Capias.*

The President of the United States of America to the marshal of the southern district of New York, greeting:

We command you that you take Christian Börs, consul for the Kingdoms of Norway & Sweden, residing in the city of New York, defendant, if he shall be found in your district, and him safely keep so that you may have his body before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, to be held at the United States court and post-office building, in the city of New York, in the said southern district, on the twenty-first day of May, 1877, to answer unto William I. Preston, a citizen of the State of New York, plaintiff in a plea of trespass: And also, to a certain bill of the said plaintiff against the said defendant for seven thousand dollars and costs, according to the custom of the said court, before the said judges, then and there to be exhibited, and that you have then there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, the 9' day of May, in the year one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

JOHN I. DAVENPORT, *Clerk.*

TRACY & CATLIN,
Pl'ff's Attorney'.

5 (Indorsed:) U. S. circuit court, for the sourther district of New York. William J. Preston vs. Christian Bors. Capias Ret. 18 . , att'y. I hereby depute to execute the within writ. Dated , 18 , U. S. marshal. Filed June 22, 1877.

I hereby certify that on the 12' day of May, 1877, at the city of New York, in my district, I personally served the within writ upon the within-named Christian Börs, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

Dated June 22, 1877.

LOUIS F. PAYNE,
U. S. Marshal, S. D. N. Y.
J. R.,

U. S. circuit court. Filed Jun' 22, 1877.
JOHN I. DAVENPORT, *Clerk.*

6 To the circuit court of the United States for the southern district of New York.

To the honorable the judges of the circuit court of the United States for the second circuit within and for the southern district of New York:

William I. Preston, who is a citizen of the State of New York, doing business in the city of New York, complains of Christian Börs, who is consul for the Kingdoms of Norway and Sweden, and residing in the city of New York, as follows:

That before and until the time hereinafter mentioned, Riley R. Wilson and Odell Wilson, copartners, composing the firm of Wilson and Son, were the owners of and entitled to the immediate possession of one hundred and thirty-five tierces of refined lard, of the value of six thousand six hundred and twenty-nine dollars and eighty-three cents.

7 That on the 8th day of April, 1876, at the city of New York, the defendant fraudulently obtained possession of said goods and unlawfully converted and disposed of the same to his own use to the damage of said Wilson & Son of the sum of seven thousand dollars.

That on the 11th day of April, 1876, said Wilson & Son duly assigned to the plaintiff for value their said claim against the defendant for damages for said conversion.

Wherefore plaintiff demands judgment against the said defendant for the sum of seven thousand dollars damages, besides costs.

TRACY & CATLIN,
Pl'ff's Att'y's, 189 *Montague s't., Brooklyn.*

8 EASTERN DISTRICT OF NEW YORK,
Kings County, ss:

William I. Preston, the above named plaintiff, being duly sworn, says that the foregoing complaint is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

WM. I. PRESTON.

Sworn to before me this 7th day of February, 1877.

JOHN P. HUDSON,
Notary Public, Kings Co.

(Endorsed:) U. S. circuit court, southern district of New York. William I. Preston vs. Christian Börs. Copy complaint. Tracy & Catlin, atty's for pl'ff, 189 Montague st., Brooklyn.

8 Due service of a copy of within complaint is hereby admitted.
Dated May , 1877.

10 United States circuit court for the southern district of New York.

WILLIAM I. PRESTON
against
CHRISTIAN BÖRS.

The defendant, Christian Börs, answers the complaint in this action as follows:

First. The defendant denies each and every allegation of said complaint.

Second. The defendant alleges that Riley R. Wilson and Odell Wilson are necessary parties to this action; that, as this defendant on information believes, they are jointly interested with said plaintiff in the event thereof, and that said plaintiff is not interested therein otherwise than jointly with said Riley R. Wilson and Odell Wilson, and that there is a defect of parties in the omission of said Riley R. Wilson and Odell Wilson.

Third. That on or about the 16th day of March, 1876, application
11 was made to this defendant to advance on the consignment of five hundred and twenty-nine tierces of lard, or thereabouts, to Brothers Nattlebohm, at Antwerp, by the steamship August Andre, and it was then and there represented to this defendant by said plaintiff, in order to induce him to make such advance, that such lard was pure, refined lard, and that in his faith in such representations this defendant advanced seventeen thousand six hundred and sixty dollars in cash and two hundred and twenty-two and $\frac{91}{100}$ dollars for insurance and brokerage on said lard, and said lard, of which the lard referred to in the complaint was part, was shipped to said Brothers Nattlebohm by said steamship August Andre, and was by them sold for account of said plaintiff or of said Riley R. Wilson and Odell Wilson, or both of them, and the proceeds of said sale were not sufficient to repay the advances of this defendant, which
12 were to be repaid first by said Brothers Nattlebohm of the net proceeds of the sale thereof, and there is an unpaid balance of one thousand and seventy-eight and $\frac{51}{100}$ dollars still due on said consignment of 529 tierces of lard, and that subsequently thereto this defendant ascertained, and he now avers the fact to be, that said representation was false and was falsely and fraudulently made by said plaintiff, and that said lard was not pure, refined lard, and was not pure, but was adulterated with water and otherwise adulterated, to the damage of this defendant in the aggregate sum of one thousand and seventy-eight and $\frac{50}{100}$ dollars, which sum this defendant counter-claims against said plaintiff for the recovery thereof, with interest from April 1st, 1876.

Fourth. That on or before the 19th day of February, 1876, the said Riley R. Wilson and Odell Wilson applied to the defendant to make advances or consignments of lard to the Brothers Nottlebohm, which
13 was to be sold for the account of the said Riley R. Wilson and Odell Wilson, or the said plaintiff, or both of them; that the defendant made large advances on said lard, of which the lard mentioned in the complaint is a part; that there is due on account of said advances the sum of forty-eight hundred and ninety-six and $\frac{99}{100}$ dollars, with interest from December 12th, 1876, no part of which has been paid.

Fifth. That on or about the 19th day of February, 1876, the said Riley R. Wilson and Odell Wilson applied to the defendant to make advances on consignments of lard to the Brothers Nottlebohm, which said lard was to be sold for the account of the said Riley R. Wilson and Odell Wilson, or the said plaintiff, or both of them, and it was then and there represented to this defendant by said Riley R. Wilson and Odell Wilson, in order to induce him to make such advances, that such lard was
14 pure, refined lard, and that in his faith in such representations, he

advanced large sums of money in cash, and for insurance and brokerage on said lard, of which the lard mentioned in the complaint was part.

That the defendant subsequently ascertained, and he now avers the fact to be, that said representation was false, and was falsely and fraudulently made, and that said lard was not pure, but was adulterated with water and otherwise adulterated, to the damage to this defendant, in the aggregate sum of forty-eight hundred and ninety-six and $\frac{99}{100}$ dollars, which said sums this defendant counter-claims against the plaintiff for the recovery thereof, with interest from December 12th, 1876.

Wherefore the defendant counter-claims and demands judgment against said plaintiff for said sum of one thousand and seventy-eight & $\frac{50}{100}$
15 dollars, with interest from 12th day of December, 1876, and for said sums of forty-eight hundred and ninety-six and $\frac{99}{100}$ dollars, with interest from the 12th day of December, 1876, and for the dismissal of the complaint and for the costs of this action.

WEEKS & FORSTER,
Def'ts Att'ys.

CITY AND COUNTY OF NEW YORK, *ss:*

Christian Börs, being duly sworn, deposes and says that he is the defendant in the above-entitled action, making the foregoing answer; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

Sworn to before me this day of , 1877.

16 (Endorsed:) U. S. circuit court. William I. Preston ag'st Christian Börs. Copy. Answer. Weeks & Forster, def'ts att'ys, 58 Wall st., N. Y. To Messrs. Tracy & Catlin, 189 Montague st., Brooklyn.

Service admitted July 23, '77.

17 United States circuit court for the southern district of New York.

WILLIAM I. PRESTON
vs.
CHRISTIAN BÖRS.

The plaintiff, by his attorneys, Tracy & Catlin, replies to the counter-claim in defendant's answer herein, and alleges:

That he denies each and every allegation contained in said answer respecting the same.

Wherefore he demands judgment as prayed for, together with costs.

TRACY & CATLIN,
Pl'ff's Att'ys.

COUNTY OF KINGS, *ss:*

William I. Preston, the above-named plaintiff, being duly sworn, says that the foregoing reply is true of his own knowledge, except as to matters

therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

18 WM. I. PRESTON.

Sworn to before me this 27th day of September, 1877.
JOHN P. HUDSON,
Notary Public, Kings Co.

(Endorsed:) U. S. circuit court. Wm. I. Preston vs. Christian Börs. Copy reply. Tracy & Catlin, pl'ff's att'ys, 189 Montague st., Brooklyn. U. S. circuit court. Filed Sep. 11, 1878. John I. Davenport, clerk.

19 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York on Thursday the 12th day of February, in the year of our Lord one thousand eight hundred and eighty.

Present: The honorable William J. Wallace, circuit judge.

WILLIAM I. PRESTON
vs.
CHRISTIAN BÖRS.

This case being still on trial, the jurors sworn in it are all called and severally answer to their names.

Evidence for the defendant:

Riley P. Wilson, recalled.
John T. Ranse, "

Mr. Foster moves that the court direct the jury to find a verdict for the defendant, and is heard in support of said motion.

The court denies said motion, and Mr. Foster excepts to the ruling of the court in so doing.

Counsel for the respective parties waive the summing up herein and agree to submit the case to the jury upon the charge of the court.

20 Charge is thereupon given by the court to the jury, who retire in charge of an officer duly qualified to attend them, and on their return say that they find a verdict for the plaintiff for the sum of seven thousand three hundred and thirteen dollars and ten cents ($7,313.10), and so say they all.

Mr. Foster moves for a new trial.

On motion of Mr. Foster, ordered that defendant have a stay of proceedings for twenty days within which to prepare and serve a bill of exceptions herein.

Immediately after the charge and prior to the entering of the jury, Mr. Foster excepts to certain portions of the charge, which he states.

A copy.

JOHN I. DAVENPORT, *Clerk.*

21 U. S. circuit court, southern district of New York.

WILLIAM I. PRESTON
vs.
CHRISTIAN BÖRS.

Judgment, August 30th, 1880.

The issues in this action having been brought on for trial before the Hon. William J. Wallace and a jury, at a stated term of the circuit court of the United States for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York on the first Monday of October, 1879, and the issues having been tried and a verdict for the plaintiff having been duly rendered by said jury, on the 12th day of February, 1880, for the sum of seven thousand three hundred and thirteen dollars and ten cents, and his costs having been adjusted at seventy-six dollars and one cent:

Now, on motion of B. F. Tracy, attorney for said plaintiff, it is
22 adjudged that William I. Preston, the plaintiff, recover of Christian Börs, the defendant, the sum of seven thousand three hundred and thirteen dollars and ten cents, the amount so found by the jury, with two hundred and forty-one dollars and thirty-two cents, being interest thereon from February 12, 1880, together with seventy-six dollars and one cent, his costs and disbursements, amounting in the whole to the sum of seven thousand six hundred and thirty dollars & forty-three cents, and that the plaintiff have execution therefor.

7,313	10
241	32
76	01
7,630	43

Judgment signed this 30th day of Aug., A. D. 1880.

J. M. DEUEL, *Dep. Clerk.*

(Endorsed:) U. S. circuit court, southern dist. N. Y. William
23 I. Preston vs. Christian Börs. Judgment roll. B. F. Tracy, pl'ff's sol'rs, 189 Montague st., Brooklyn. U. S. circuit court. Filed Aug. 30, 1880. John I. Davenport, clerk.

24 The people of the State of New York to James Riley Weaver, esq., United States consul at and for the city of Antwerp, Belgium:

Know ye that we, with full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize you, James Riley Weaver, esq., to examine under oath Augustus Nottlebohm, Edward Nottlebohm, Louis Janessons, and various other persons in whose hands the lard referred to in the complaint was placed for sale, and by whom the same was examined, whose real names are unknown, & who may be produced before you, as witnesses in a cause pending in the supreme court of the State of New York in which William I. Preston is plaintiff and Christian Börs is defendant, on the part of the said defendant, on oath upon the interrogatories annexed to this commission,
25 and to take and certify the depositions of the witnesses and return the same according to the directions hereunto annexed.

Witness, Hon. J. F. Barnard, a justice of the supreme court, the 10th day of July, one thousand eight hundred and seventy-six.

GEORGE G. HERMAN, *Clerk.*

Direction for executing the commission.

The persons to whom such commission shall be directed, or any one of them, unless otherwise expressly directed therein, shall execute the same as follows:

1. They, or any one of them, shall publicly administer an oath to the witnesses named in the commission that the answer given by such witnesses to the interrogatories proposed to them shall be the truth, the whole truth, and nothing but the truth.

2. They shall cause the examination of each witness to be reduced to writing, and to be subscribed by him and certified by such of the
2 commissioners as are present at the taking of the same.

3. If any exhibits are produced and proved before them they shall be annexed to the depositions to which they relate, and shall in like manner be subscribed by the witness proving the same, and shall be certified by the commissioners.

4. The commissioners shall subscribe their names to each sheet of the depositions taken by them; they shall annex all the depositions and exhibits of the commission, upon which their return shall be endorsed; and they shall close them up under their seals, and shall address the same when so closed to the clerk of the court from which the commission issued, or to the clerk of the county in which the venue shall be laid, as shall have been directed on the commission, at his place of residence.

5. If there is a direction on the commission to return the same
27 by mail they shall immediately deposit the packet so directed in the nearest post-office.

6. If there be a direction on the commission to return the same by an agent of the party who sued out the same, the packet so directed shall be delivered to such agent.

The above is an extract from the revised statutes of the State of New York (4th ed., vol. 2, page 639) relating to the taking of testimony out of the State.

(Endorsed:) This commission, when executed, is to be returned to Messrs. Weeks & Forster, No. 58 Wall street, New York City, U. S. A.

J. F. BARNARD,
Justice Sup. Ct.

The execution of this commission appears in certain schedules hereunto annexed.

Commissioner.

28 *Defendant's interrogatories under annexed commission.*

Supreme court.

WILLIAM I. PRESTON
against
CHRISTIAN BÖRS.

1st. Interrogatory. What is your name, age, residence, and occupation? How long have you been engaged in such occupation? If a partner or

employee in any firm, state the name of such firm and your connection therewith.

2d. Interrogatory. Do you know the parties to this action or either of them? If you know either of them, how long have you known him? Did you ever know of a firm of Wilson & Son doing business in New York City in the United States? If yea, state whether you ever had any business transactions with them in any manner, directly or indirectly? Answer fully or in detail.

3rd. Interrogatory. Do you know anything about any shipment or consignment of 529 tierces of lard, or thereabouts, to Brothers Nottle-
29 bohm, at Antwerp, by the steamship August Andre, made by or for account of said Wilson & Son? If yea, state what you know about it. Answer fully and specifically.

4th. Interrogatory. If in answer to the 2nd or 3rd interrogatory you have referred to any shipment or consignment of lard, please to state whether you ever personally examined such lard; and, if yea, what was its condition. Was it pure or adulterated? If you say it was adulterated, with what substance or substances was it adulterated, and to what extent?

5th. Interrogatory. If you have referred to a shipment of lard by the steamer August Andre, state whether you are acquainted with the value of lard at Antwerp. Have you bought and sold lard? To what extent? What knowledge have you on the subject of such value, and what are your means of knowledge? What was the value of said shipment of lard on its arrival at Antwerp in the condition in which it actually was?
30 What was the difference between its value and that of pure, refined lard? What was the value of pure, refined lard at that time?

6th. Interrogatory. Do you know whether or not Brothers Nottlebohm received any other consignment of lard from or for account of said Wilson & Son prior to the arrival of said consignment by the August Andre at Antwerp? If yea, state what you know on that subject; give the dates of arrival of each shipment, the name of the vessel by which each arrived, the amount of lard in each shipment; and, if you can, annex a copy of each bill of lading therefor on the original.

7th. Interrogatory. If you, in answer to the 6th interrogatory, refer to any other consignment of lard, state what was the condition of each consignment. Was it pure or adulterated? If you say any of them were adulterated, with what substance or substances was each adulterated, and to what extent?

8th. Interrogatory. What was the value of each consignment of
31 lard mentioned in your answers to the 6th & 7th interrogatories on its arrival in the condition in which it was? What was the difference between its value & that of pure, refined lard? What was the value of pure, refined lard at that time?

9th. Interrogatory. Has any of the lard referred to in your answers to previous interrogatories been sold? If yea, when, and for what price? Annex the accounts of such sales, and state if the same are correct, just, and true in all respects.

10th. Interrogatory. Do you know of any other matter or thing which may, in any manner, benefit the defendant and enable him to prove his

defense herein? If yea, state the same as fully and particularly as if specially interrogated in relation thereto.

WEEKS & FOSTER,
Def'ts Attorneys.

Allowed & settled.

J. F. BARNARD,
Justice Sup. Ct.

32 (Endorsed:) Supreme court. William I. Preston ag'st Christian Bors. Interrogatories.

GENTLEMEN: Take notice that within interrogatories will be presented to one of the justices of this court at the chambers thereof, in the county court-house, in the city of Brooklyn, on the 5th day of June, 1876, at 10 o'clock a. m., for settlement.

New York, June 1st, 1876.

Yours, &c.,

6–157. WEEKS & FORSTER,
Defendants Att'ys, 58 Wall st.

To Messrs. TRACY & CATLIN,
Pl'ff' Att'ys.

Due service of the within interrogatories, and notice of settlement, is hereby admitted this 1st day of June, 1876.

33 Settlement of within interrogatories adjourned to Saturday, June 10th, at 10 a. m.

June 9th, '76.

TRACY & CATLIN,
Pl'ff's Att'ys.

We hereby consent that the settlement of the within interrogatories be adjourned to Tuesday, June 13th.

June 9th, '76.

34 *Instructions to commissioners.*

Annexed to the commission is an extract from the statutes of the State of New York, relative to the taking of testimony out of the State, which extract is directed by law to be annexed to the commission. But as it does not comprise everything necessary to be atteneded to by the commissioners they are requested to observe the following more ample

INSTRUCTIONS:

I. All the commissioners named in the commission should have notice of the time and place of executing it; and if any of them do not act let the fact that they were notified, or could not be notified, and the reasons for their not acting, be stated.

II. The commission must be executed by James R. Weaver, the commissioner named therein.

III. The acting commissioner will examine the witnesses separately after publicly administering to them the following oath or affirmation:

35 "You do swear that the answers which shall be given by you to the interrogatories proposed to you shall be the truth, the whole truth, and nothing but the truth, so help you God."

The oath shall be administered (except in cases hereinafter mentioned) by the witness laying his hand upon and kissing the Gospels. But if the witness shall desire it he shall be permitted to swear in the following form: "You do swear, in the presence of the ever loving God," and while so swearing he may or may not hold up his hand, in his discretion. Or, if the witness shall declare that he has conscientious scruples against taking an oath, or swearing in any form, he shall be permitted to make his affirmation in the following form: "You do solemnly, sincerely, and truly declare and affirm," omitting the words, "so help you God."

IV. The general style or title of the depositions must be drawn up in the following manner:

36 Deposition of witnesses produced, sworn (or affirmed), and examined the day of , in the year one thousand eight hundred and seventy-six, at Antwerp, in the Kingdom of Belgium, under and by virtue of a commission issued out of the supreme court of the State of New York, county of Kings, in a certain cause therein depending and at issue between William I. Preston, plaintiff, & Christian Börs, defendant, as follows:

A. B., of (insert his place of residence and occupation), aged years and upward, being duly and publicly sworn (or affirmed), pursuant to the directions hereto annexed, and examined on the part of the (defendant), doth depose and say as follows: First. To the first interrogatory he saith: &c. (insert the witnesse's answer). Second. To the second interrogatory he saith: &c., and so on throughout. If he cannot answer let him say that he knoweth not.

V. If there be any cross-interrogatories the witness will go on thus: First. To the first cross-interrogatory he saith: &c., and so on throughout.

VI. When the witness has finished his deposition let him sub-

37 scribe it, and the acting commissioner will certify as follows:

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 6th day of Sept., 1876, before

JAS. RILEY WEAVER,
Commissioner.

VII. If any papers or exhibits are produced and proved they must be annexed to the depositions in which they are referred to, and be subscribed by the witness, and be endorsed by the acting commissioners, in this manner:

"At the execution of a commission for the examination of witnesses between William I. Preston, plaintiff, and Christian Börs, defendant, this paper writing was produced and shown to (insert witness's name), and by him deposed unto at the time of his examination before me.

JAS. RILEY WEAVER,
Commissioner.

38 VIII. The acting commissioners will sign their names to each half sheet of the depositions and exhibits.

IX. If an interpreter is employed one of the commissioners will administer to him the following oath and certify thereto:

"You do solemnly swear that you will truly and faithfully interpret the oath and interrogatories to be administered to , a witness now to be examined, out of the English language into the language, and that you will truly and faithfully interpret the answers of the said thereto, out of the into the English language."

Let the depositions be subscribed by the interpreter as well as by witness, and certified by the acting commissioner, as follows:

Examination taken, reduced to writing, subscribed by the witness and by the sworn interpreter, and sworn to by the witness this day of , 1876, before

Commissioner.

39 X. The commissioner will make return on the back of the commission by endorsement, thus:

"The execution of this commission appears in certain schedules hereunto annexed."

Commissioner.

XI. The depositions and exhibits (if any) must be annexed to the commission, and then the commission, the directions, the interrogatories, cross-interrogatories, depositions, and exhibits must be folded into a packet and bound with tape. The acting commissioners are to set their seal at the several meetings or crossings of the tape, endorse their names on the outside, and direct it thus:

To , Esquire,
Clerk of the , *at* .

XII. When the commission is thus executed, made up, and directed, it must be returned in the manner specified in the direction of the
40 commission, if there be any.

XIII. If there be no direction on the commission specifying the manner in which it is to be returned, then it must either be delivered to the court by one of the acting commissioners personally, or else be forwarded by some person coming to this place, and who must be liable on his arrival to make oath before one of the judges or clerk of the court:

"That he received the same from the hands of A. B., one of the commissioners, and that it had not been opened or altered since he so received it."

XIV. In case of returning the commission by mail, it is to be deposited by one of the acting commissioners in the nearest post-office, he making the following endorsement thereon:

"Deposited in the post-office at Antwerp, Belgium, this sixth day of Sept., 1876, by me.

"JAS. RILEY WEAVER,
" *Commissioner.*"

In case of returning the commission by a vessel, it is to be de-

41 posited by one of the acting commissioners in the letter-bag of such vessel, he making upon the commission the following endorsement:

"Deposited in the letter-bag of the , now lying at , and bound for the port of New York, this day of , 18 , by me.

"*Commissioner.*"

The commissioners are requested to be very careful to observe the foregoing instructions, as the smallest variation may vitiate the execution of the commission.

If the commission be returned by an agent, let him be instructed to call, on his arrival at this place, upon , who will direct him as to its delivery.

42 Deposition of witnesses produced, sworn, and examined the sixth day of Sept., in the year one thousand eight hundred and seventy-six, at the consulate of the United States of America, at Antwerp, Belgium, under and by virtue of a commission issued out of the supreme court of New York, in a certain cause therein pending and at issue between William I. Preston, plaintiff, and Christian Börs, defendant, as follows:

(On the margin:) Jas. Riley Weaver.

AUGUST NOTTLEBOHM, merchant, at Antwerp, being duly and publicly sworn, pursuant to the direction hereto annexed, and examined on the part of the defendant, doth depose and say as follows:

First. To the first interrogatory he saith: August Nottlebohm; fifty-nine years old; reside in Antwerp merchant; I am since nine years partner in the firm of Brothers Nottlebohm.

Second. To the second interrogatory he saith: I only know Christian Börs, I should say, since nearly twenty years. I do not know per-
43 sonally the firm of Wilson & Son, in New York, but my firm received this year, through the interference of Mr. Christian Börs, several consignments of lard for their account.

Third. To the third interrogatory he saith: The consignment of 529 tierces lard per steamer August Andre reached here on the 29th April, proved of very inferior quality, quite unsuitable for our market, and unsaleable at the time. Hitherto only four tierces sold at fls. 30 and fourteen tierces at fls. 29, as sample lots.

Fourth. To the fourth interrogatory he saith: The samples of this lard were examined by me; found very common, containing water. I have not had it analyzed by a chemist, therefore cannot give exact proportions.

Fifth. To the fifth interrogatory he saith: Dealing very largely in lard, I am fully acquainted with the valueof the article. The 529 tierces, Wilson, per st'r August Andre, were unsalable on arrival. I would
44 have accepted twenty-nine frs. or less from wharf, but could get no offers. Wilcox lard was selling at that date at frs. 35¾ to frs. 36 (guilders).

Sixth. To the sixth interrogatory he saith: Brothers Nottlebohm received, besides, the following consignments of Wilson's lard through Mr. Christian Börs:

W., 100 tierces per steamer Aug. Andre. Bill of lading dated Feb. 16th, arriving 5th March, 1876.
1 tierce short, paid by captain.
15 do. sold 17th April, at frs. 33.
84 do. unsold.

100 tierces.

W., 100 tierces per st'r C. F. Funch. Bill of lading dated 7th March arrived about 23rd March, unsold.
W., 142 tierces per st'r C. F. Funch; 25 tierces sent for sale to Rotterdam and unsold, only 22 being offered at the time.
10 do. sold 21st April, at 30.
10 do. sold 4th May, "
97 do. unsold.

142 tierces.

(On the margin:) Jas. Riley Weaver.

45 Seventh. To the seventh interrogatory he saith: I consider the first shipment of 100 tierces as the best, and on the first look it appears unmixed, but the buyer of the 15 tierces as samples would buy no more on examining it and melting it. All the other lots are very common and watered.

Eighth. To the eighth interrogatory he saith: I refer to particulars given in the sixth answer; notwithstanding all the trouble given it was impossible to sell from wharf, or hitherto out of store, except a few sample lots.

Ninth. To the ninth interrogatory he saith: I stated sales in answers 3 and 6; only sample lots being sold, no accounts can be made out.

Tenth. To the tenth interrogatory he saith: I have often requested Mr. Christian Börs to endeavor to get our advances and actual charges back against delivery of the lard, relinquishing all commissions, but to no
46 purpose. We have been very badly treated with these shipments of inferior lard the balance due us will no doubt be very large, and we can get nothing to cover our over advances. I attend to the provision and lard business in our firm.

Annexed certificate of our principal lard broker.

AUG. NOTTLEBOHM.

(On ehe margin:) Jas. Riley Weaver.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this sixth day of Sept., 1876.

[SEAL.] JAS. RILEY WEAVER,
U. S. Consul and Commissioner.

47 Je, soussigné, I. Cantereels Van Aerven, courtier de commerce près de la Bourse d'Anvers, déclare par présent certificat, avoir consciencieusement examiné les parties suivantes de saindoux arrivés de New York, par les steamers sousnommés, d'envoi de Messieurs Wilson & Son de New York, à la consignation de Messieurs Frères Nottlebohm d'Anvers, savoir:

W. 100 tierçons saindoux, arrivés le 5 mars, 1876, par str. Aug. André. (On margin:) Jas. Riley Weaver.

W. 100 tierçons saindoux, arrivés le 23 mars, 1876, par steamer C. F. Funch.

W. 142 tierçons saindoux, arrivés le 23 mars, 1876, par steamer C. F. Funch.

W. 529 tierçons saindoux, arrivés le 29 avril, 1876, par steamer Aug. André, et après un examen des plus sérieux, je dois déclarer que la qualité, en est inférieure, non marchande et invendable, sauf la première partie de 100 tierces par steamer Aug. André, qui sans être de bonne qualité marchande et vendable, sont cependant d'une qualité un peu meilleure que celle des trois autres parties.

48 Quelques tierçons placés par mon entremise, à titre d'essai, ont été trouvés d'une qualité tellement inférieure, qu'il m'a été de toute impossibilité, après essai fait, d'en placer encore.

Je déclare être prêt à affirmer les présentes declations sous serment ou de besoin, & signé à Anvers le six september, 1800 soixante-seize.

I. CANTEREELS VAN AERVEN.

Sworn to before me this 6th day of Sept., 1876, in the city of Antwerp.
[SEAL.] JAS. RILEY WEAVER,
U. S. Consul.

(Endorsed:) Supreme Court. William I. Preston vs. Christian Börs. Commission. Weeks & Foster, attorneys for defendants, 58 Wall st., N. Y.; Tracy & Catlin, pl'ff's att'ys.

49 PLAINTIFF'S EX. 4.

NEW YORK, *April 10th*, 1876.

WILLIAM I. PRESTON:

DEAR SIR: I return you the enclosed letter, and will merely state that I am only accountable towards Mess. Wilson & Son for the lard they have consigned to me, and that I do not know you at all in their transactions with me.

Yours, truly,

CHRISTIAN BÖRS.

PLAINTIFF'S EX. 5.

[Grain, flour, provisions, &c. William I. Preston, commission merchant, No. 12 Bridge st.]

CHRISTIAN BÖRS, Esq.:

DEAR SIR: I am in advance to Wilson & Son about five thousand dollars on the 135 tierces refined lard delivered to dock of Antwerp steamers to be shipped through you under advances by you to him.

50 Mr. Wilson informs me you were sick Saturday, & could not sign check until to-day, and that to-day you refuse to make him the advance.

Please take notice that I have an advance on that lot of lard as above named, besides my commission, and that I demand the delivery of the

same to me, or I shall hold you for my advances on same, and I shall take such legal steps as may be necessary to obtain the same.

Yours,

WM. I. PRESTON.

51 DEFENDANT'S EXHIBIT 7.

[Funch, Edye & Co.'s pier, alongside Pavonia Ferry, Jersey City.]

Received, in good order and condition, on dock for steamship August André, from M. Christian Börs.

Marks, numbers, packages, contents. W. 1–104. One hundred and four (104) tcs. lard.

Not responsible for fire.

Jersey City, March 15th, 1876.

WM. HUNTER, *Dock Clerk.*

DEFENDANT'S EXHIBIT 8.

[Funch, Edye & Co.'s pier, alongside Pavonia Ferry, Jersey City.]

Received, in good order and condition, for steamship August André, from Mr. Chr. Börs.

Marks, numbers, packages, contents. W. One hundred and fifty tcs. lard.

Jersey City, March 23rd, 1876.

F. HAGAMANN, *Dock Clerk.*

52 DEFENDANT'S EXHIBIT 9.

[Funch, Edye & Co.'s pier, alongside Pavonia Ferry, Jersey City.]

Received, in good order and condition, on dock for steamship August André, from Mr. Christian Börs.

Marks, numbers, packages, contents. W. One hundred & forty (140) tcs. lard.

Not responsible for fire.

Jersey City, M'ch 29th, 1876.

WM. HUNTER, *Dock Clerk.*

DEFENDANT'S EXHIBIT 10.

[Funch, Edye & Co.'s pier, alongside Pavonia Ferry, Jersey City.]

Received, in good order and condition, for steamship André, from M. Ch. Börs.

Marks, numbers, packages, contents. W. (135) one hundred and thirty-five tcs. lard.

Jersey City, April 8th, 1876.

G. LUCEY, *Dock Clerk.*

53 DEFENDANT'S EXHIBIT 11.

Supreme court.

WILLIAM J. PRESTON
against
CHRISTIAN BÖRS.

The plaintiff, WILLIAM J. PRESTON, appearing in pursuance of the summons and order for his examination before trial, and being duly sworn, testifies as follows:

Q. What are your age and occupation?
A. 48 years of age; commission merchant.
Q. General commission merchant?
A. Grain and provisions.
Q. Do you know Mr. Christian Börs?
A. I do.
Q. How long have you known him?
A. Since January last.
Q. Do you know the partners who compose the firm of Wilson & Son?
A. I do.
Q. Who are they?
A. R. P. Wilson and O. Wilson.
Q. When was the assignment referred to in your complaint made?
A. April 11th, 1876.
54 Q. Where was it made?
A. At my office.
Q. Who was present when it was made?
A. Wilson & Son and Mr. Levi Cook, jr.
Q. Was any one else present?
A. No, sir.
Q. When was this assignment first spoken of?
A. On the night of the 10th of April or the morning of the 11th.
Q. Where was that, and who was it spoken of by?
A. With my attorney, Gen'l Tracy; at his house I think.
Q. What was said?
A. I said to my attorney that I was under advance to Wilson & Son upon this lard in question, and that Mr. Börs refused to carry out his arrangement with Wilson to advance to Wilson & Son on the lard, and I wanted to get my money.
Q. Who was present with you at this time?
A. R. P. Wilson; I am not certain whether the son was with me or not.
Q. Was this assignment in writing?
A. It was.
55 Q. What was the consideration of this assignment?
A. One dollar in cash paid, and the money that was due to me on the advance on the lard.
Q. How much did that amount to about?
A. Some five or six thousand dollars.
Q. Was there no other consideration?

A. I don't think of any.

Q. In what language was the assignment made, about?

A. I said to Wilson & Son that I would buy this right of action for one dollar cash, which I handed the son, and the other consideration, which was the money which was advanced by me to them.

Q. Did you have a statement of the account between you and them at that time?

A. I think there was no regular statement or account-current made up at that time.

Q. Did you give them a receipt?

A. I did not.

Q. Do you mean to have it inferred from what you say that Wilson & Son made nothing on this transaction?

A. I don't think they did make anything.

56 Q. Had you advanced Wilson & Son five or six thousand dollars on the lard referred to in your complaint?

A. I had.

Q. Where was this lard at the time of this assignment?

A. As near as I could learn it had been delivered to the Antwerp steamer dock, Jersey City.

WM. J. PRESTON.

(On margin:) 11th. Tracy & Catlin.

We hereby consent that *that* the further examination of William J. Preston herein be adjourned until Nov. 11th, 1876, at 2 o'clock p. m.

TRACY & CATLIN,
Pl'ff's Att'ys.

We hereby waive the filing of the foregoing examination, and the same is hereby adjourned till Nov. 17th. Same to be verified at the office of Weeks & Forster, in the mean time, and to be used with the same effect as if verified before the court.

TRACY & CATLIN,
Pl'ff's Att'ys.

57 (Endorsed:) Supreme court. William J. Preston vs. Christian Börs. Examination of plaintiff before trial. Weeks & Forster, def't's att'ys., 58 Wall St.

58 DEFENDANT'S EX. 12.

[Grain, flour, provisions, &c.—William J. Preston, commission merchant, No. 12 Bridge st.]

NEW YORK, *Jan'y* 31, 1879.

CHRISTIAN BÖRS, Esq., *City*:

D. SIR: In answer to your request by Mr. Machere, for one address of Mr. Wilson, I beg to state that Mr. Wilson called to-day, and I said to him you wished to see him, and he said he was very busy, and you might address him at his office No. 160 Fulton st., room 12, city.

Yours, truly,

WM. J. PRESTON.

59 U. S. circuit court for the southern district of New York.

WILLIAM J. PRESTON
ag'st
CHRISTIAN BÖRS.

We hereby consent that the depositions taken under the commission issued in the action brought in the supreme court of the State of New York, in which William J. Preston was plaintiff and Christian Börs was defendant, be used on the trial of this action with the same force and effect as if the commission under which they were taken had been issued in this action, and subject to all legal objections to any interrogatory or answer thereto or any portion of such answer.

Dated Nov. 1st, 1878.

TRACY & CATLIN,
Pl'ff's Att'ys.

60 (Endorsed:) U. S. circuit court. William J. Preston vs. Christian Börs. Consent to use depositions. Def't's Ex. 13.

61 DEFENDANT'S EXHIBIT C.

Account sale of 529 tierces lard received by the Auguste André and sold here by order & for account of Messrs. Wilson & Son, of New York, as follows, viz*t*:

W. 1-529 Sold in the 20th June, 19th July, 2nd August, & 22nd ulto., payable at 30 days:

4 tierces of lard, weighing— Gross, 726½ kilo.; tare, 27 kilo.; net, 618½ kilo., at *f*30 per 50 kilo.													*f* 371. 10
14	"	2,498	"	each	"	"	2,120	"	"	"29	"	.	1,229. 60
506	"	9,108½	"	"	"	"	77,419½	"	"	"26	"	.	40,258. 14
													f 41,858. 84
Or at *f*189=400 francs													88,590. 14
Discount, 2 %													1,771. 80
Average due 19th inst., fr's													86,818. 34
5 gross sold at Liverpool:													
Wg. 14cwt. 2q., 16, at 46.6 per cwt., £ st											34	11*d*	
Discount, 2½ %											17		
									£ st.	33	3	11*d*	
Charges freight, brokerage, &c., at Liverpool											2 18	7*d*	
									£ st.	30	5	4*d*	
At *f* 25.19, due 24th inst													762. 41
529 tierces, due 19th inst., francs													87,580. 75

CHARGES.

Freight on 212,437 lbs., at 40*s*. per 2,240 lbs., £ st	189	13	6*d*
Primage, 5 %	9	9	8*d*
£ st.	199	3	2*d*
At *f* 25.26, due 2d May, francs			5,030. 74
167 days' interest, at 5 %			116. 69

Labor receiving goods, watching on the quay, cartage, housing, cooperage, *housing*, *cooperage*, shipping, & sea-insurance of 5 t'ces sent to Liverpool, weighing, delivering, &c.	644.50	
Entrepot duty & fire insurance	944.63	
Brokerage on sales, ¼ %	651.12	
Bill-brokerage & stamps	1.19	
Bring over, f'cs	7,388.87	*f* 87,580.75
62 Carried forward, f'cs	7,388.87	*f* 87,580.75
Commission & guarantee, 3 %	2,627.42	
Telegrams' share	314.30	
Postages, franking, petties	19.20	
		10,349.79
Net proceeds, francs		77,230.96

To the credit of Messrs. Wilson & Son, of New York, under date of 19th inst.
E. E.

Antwerp, 21st October, 1876.

BROTHERS NOTTEBOHM.

63 DEFENDANT'S EXHIBIT E.

[The United States Cable Company, Limited.]

Time received, 8.18, April 8th, 1876. Date, April 8th, 1876.

Received the following transatlantic telegram from Anvers, via direct cable:

To BÖERS, *N. Y.*:

Wilson watered, adulterated, worth perhaps between 30 and 31 guilders; advise us at once what to do.

NOTTLEBOHM.

DEFENDANT'S EXHIBIT F.

[The United States Cable Company, Limited.]

Time received, 12.43, May 3rd, 1876. Date, May 3rd, 1876.

Received the following transatlantic telegram from Anvers, via direct cable:

To BÖERS, *N. Y.*:

Buy 500 Wilcox, steamer, May shipment, 33¼ highest; answer in two days; require immediate margin; Harrison; Wilson unsaleable.

NOTTLEBOHM.

64 DEF'TS EXHIBIT G.

[Isidor Walz, Ph. D., Chas. M. Stillwell, A. M., P. O. box 1261. Office and laboratories of Walz & Stillwell, analylical and consulting chemists, No. 18 Exchange Place.]

NEW YORK, *April* 20, 1876.

Result of test of three samples of lard, marked 1, 2, *&* 3, *received form Christian Börs, esq., April* 19*th*, 1876.

	No. 1.	No. 2.	No. 3.
Moisture	9.00 %	5.30 %	8.00 %

The melting and solidifying point of the fatty acids obtained from these samples was found in each case at 40 C., which is that of pure lard, and shows that besides the water no other impurities or adulterations are present.

WALZ AND STILLWELL.

65 Pleas in the circuit court of the United States for the southern district of New York, in the second circuit, before the judges thereof, at the court-room in the city of New York, in the same district, on the third Wednesday of October, in the year one thousand eight hundred and seventy-nine:

Witness, Hon. Samuel Blatchford, circuit judge.

, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 9th day of May, in the year 1877, came into this court, before the judges thereof, at the court-house in the city of New York, in the district aforesaid, William J. Preston, a citizen of the State of New York, by Tracy & Catlin, his attorneys, and then and there brings his bill against Christian Börs, consul for the Kingdoms of Norway and Sweden, residing in the city of New York, being in custody, &c., in a plea of trespass, which said bill follows in

66 these words, that is to say:

(Insert the complaint, answer, and reply.)

Wherefore the issue as above joined are ordered by the said circuit court to be tried at the term of the said circuit court appointed to be held at the court-house in the city of New York aforesaid, in the district aforesaid, on the third Monday of October, in the year 1879.

At which last-mentioned day and place in the court aforesaid, before the honorable William J. Wallace, district judge of the United States for the northern district of New York, the judge then solely presiding therein, and holding the same pursuant to the statutes in that behalf made and provided, come as well the plaintiff aforesaid by his attorneys aforesaid as the defendant aforesaid by his attorneys aforesaid, in the plea aforesaid, and the jurors of the jury duly summoned to try the said issues also come, who, to speak the truth of the matters aforesaid, being chosen, tried, and sworn, say upon their oath that the plaintiff is entitled to recover

67 of the defendant for 45,723 pounds of lard at thirteen cents a pound $5,943.99, and for interest at 6 per cent. from April 10, 1876, 3 years, 10 months, and 2 days, 1,369.11; in all, $7,313.10 damages; wherefore it is considered by the said circuit court now here, that the said plaintiff, William J. Preston, do recover of Christian Börs, the said defendant, seventy-three hundred and thirteen dollars and ten cents damages ($7,313.10) and the further sum of two hundred and forty-one & $\frac{32}{100}$ dollars interest from February 12th, 1880, to August 30, 1880, & the sum of seventy-six dollars and one cent for his costs, amounting to the sum of seven thousand six hundred and thirty dollars & forty-three cents ($7,630.43), by this court now here adjudged to said plaintiff, according to the form of the statutes in such case made and provided, and that said plaintiff have execution thereof. Judgment signed this 30th August, A. D. 1880.

, *Clerk.*

68 Circuit court of the United States for the southern district of New York.

WILLIAM J. PRESTON
versus.
CHRISTIAN BÖRS.

And afterwards, to wit, at the day and place within contained, before the honorable William J. Wallace, presiding judge, comes, as well the said William J. Preston by Tracy & Catlins, his attorneys, and Benjamin F. Tracy, esq., his counsel, as the said Christian Börs, by Weeks & Forster, his attorneys, and George H. Forster, esq., and Frederick P. Forster, esq., his counsel, and the jurors of the jury, whereof mention is within made, being called, likewise came, and after being elected and sworn to try the several issues within joined—

The plaintiff opened the said case to the court and said jury.

The plaintiff then called as a witness on his behalf RILEY P.
69 WILSON, who, being duly sworn, testified as follows:

Q. Mr. Wilson, what was your business at the commencement of the year 1876?

A. Refining lard.

Q. In this city?

A. Yes, sir.

Q. Did you have any agreement with Christian Börs about consigning lard to him?

A. Yes, sir.

Q. I hand you paper and ask you if this is the signature of Mr. Börs. (Handing witness paper.)

A. Yes, sir; it is.

Paper read in evidence as follows:

FEB. 8TH.

To Messrs. WILSON & SON:

Memorandum from Christian Börs, 18 Exchange Place.

I herewith agree to advance you until further notice on whatever quantity of refined lard, not less the one hundred tierces at a time. You may consign through me, for shipment to my friends in Europe, at the rate of one cent less than Western lard is selling, advances to be made after the goods are shipped and on presentation of the ship's receipts and proper weigh-master's returns.

70 CHRISTIAN BÖRS.

(Paper marked "Plaintiff's Exh. No. 1.)

Q. Now, under that agreement, Exh. No. 1, did you make consignments of lard to the defendant?

A. Yes, sir.

Q. Can you state when you made your first consignment?

A. It was a week, I think, or two weeks after that; Feb. 16th was the first.

Q. What quantity?
A. One hundred tierces.
Q. When was your next?
A. On the first of March.
Q. What quantity?
A. One hundred tierces.
Q. When your next?
A. On the 7th of March; 142 tierces.
Q. When your next?
A. On the 16th of March; 104 tierces.
Q. And your next?
A. On the 23rd of March; 150 tierces.
Q. And your next?
A. On the 29th; 140 tierces.
Q. And your next?
A. April 8th; 135 tierces.
Q. What was the course of business in making these consignments; what did you do and what did you receive and what did you pre-
71 sent to Börs for the purpose of obtaining your advance?
I got the ship's receipts and the dock-weigher's returns.
Q. You took the lard to the steamer?
A. Yes, sir; over to Jersey City or Hoboken.
Q. What line?
A. The Antwerp line, I think.
Q. The Antwerp line of steamers at Jersey City?
A. Yes, sir.
Q. What did you obtain there?
A. After delivering the lard and it being examined by Mr. Börs' agent I got the ship's receipts and weigher's returns; took them to Mr. Börs' office and got my checks.
Q. Where is Mr. Börs' place?
A. In Exchange Place; No. 47, I think.
Q. What did you present to him in order to get your advances?
A. I presented a statement of the prices of Western lard, deducting one cent a pound from the amount of the net weight of the lard with these ship's receipts and weigher's returns, and got my check.
72 Q. You presented the shipper's receipts and weigher's returns?
A. Yes, sir.
Q. And then you received his check?
A. Yes, sir.
Q. What was the custom in regard to receiving samples; sampling this lard before it was delivered?
A. Always weighed; I took a hundred tierces over there; the lard was sampled.
Q. Where?
A. Over at the dock in tierces.
Q. Where was it weighed?
A. At the same place.
Q. By whom was it sampled?
A. By a man named Billy; I don't know who he was, but some of Mr. Börs' party that did the sampling.

Q. It was not any man employed by you?
A. No, sir.
Q. He took the samples of lard on every occasion?
A. Yes, sir.
Q. Did you afterwards see those samples in Mr. Börs' office?
A. Yes, sir.
Q. Now I come down to the shipment in question, of 135 tierces; did you make such consignment or shipment?
A. I did.
73 Q. On what day?
A. I think the 8th of April.
Q. State in detail what you did in regard to that consignment of lard.
A. I did just the same as in all the other cases, and when I presented the ordinary documents for the check.
Q. State what you did.
I got my weigher's receipts and shipping bill, and on Saturday, about half-past two o'clock, presented them for my check, which amounted to something about six thousand dollars. Mr. Börs' book-keeper said that Mr. Börs had been taken suddenly sick, and wished me to wait until Monday morning; said he, "Come in on Monday morning at 11 o'clock, promptly, and you shall have your check." I told him that I wanted money very much, as I could use it after three o'clock. He said that Mr. Börs was very sick, and that possibly I could not find him, and re-
74 quested me to wait until Monday. I made known this state of the case to Mr. Preston.
Q. Did you go for your check on Monday?
A. I did, sir.
Q. Did you see Mr. Börs?
A. I did.
Q. Where?
A. At his office.
Q. State what occurred.
A. He refused to make any advances.
Q. What did he say?
A. He said that the lard was not what it ought to be; that it was watered, and he should not make any advances. I told him that the lard was precisely the same as he had been accepting all the time, and that his own inspector had told me that the lard I was making was as good as Wilcox's, if not better, and that it was the same he had been receiving week after week, made precisely in the same way. A. I told him that Mr. Preston had made advances on that lard, and that the money was due him, and I must have it, or else have the lard back again.
Q. What did he say to that?
A. Refused to do either.
Q. What did you do then?
75 A. I informed Mr. Preston of the fact.
Q. Did you and Mr. Preston then go up to Mr. Börs?
A. Yes, sir; and he refused to make any advances or deliver the lard.
Q. Now, on the first of April, 1876, did you receive that communication from Mr. Börs? (Handing witness paper.)
A. I did, sir.

(Paper offered in evidence, and marked "Plaintiff's Exh. No. 2.")

Q. You received that letter from Mr. Börs on the first of April?

A. Yes, sir.

Q. Did you on the same day receive this communication? (Handing witness another paper.)

A. I did.

Q. Is the envelope pinned on it?

A. Yes, sir.

Memorandum—Christian Börs, 18 *Exchange Place, New York, April* 1*st*, 1876.

To Messrs. WILSON and SON:

The agents of the Antwerp steamer inform me that they want to
76 know the exact quantity of lard you will ship in all, as they have an offer for the balance of freight-room. Please let me know how much you will still ship. My Antwerp friends advise the sale of your first lot of lard; quality satisfactory.

Not signed.

Q. About this time did you have a conversation with Mr. Börs as to the quantity he advised you to ship?

A. Yes, sir; I did.

Q. When was it, with reference to the receipt of these communications of April first?

A. It was about that time; he wished me to get ready all I possibly could; as much as possible.

Q. Was not any quantity mentioned?

A. He would take a thousand tierces, if he could get them, he said. I told him I would get ready all I could.

Q. When you saw Mr. Börs on Monday, April 10th, did he present any appearance of sickness?

A. No, sir; he looked perfectly well.

Q. Did he say that he had been sick on Saturday?

77 A. No, sir; he did not tell me that he had.

Q. After he refused to make the advance or redeliver the lard, what did you do in regard to assigning your claim to Mr. Preston?

A. I assigned it to Mr. Preston on the 11th, I think.

Q. Were you owing Mr. Preston at the time?

A. I was; yes, sir.

Q, You were owing him at the time?

A. Yes, sir.

Q. For what?

A. For advances on the stock of lards, &c.

Q. Which he had purchased in order to enable you to refine the lard in question?

A. Yes, sir.

Q. Did Mr. Börs know during the progress of this business that Mr. Preston was making these advances?

A. Yes, sir; he knew it.

Q. Had you taken, before Mr. Preston consented to make the advances, plaintiff's Exh. No. 1, the agreement to him?

A. Yes, sir; I did.

Q. I hand you a copy of the weigh-bill and ask you if this is
78 a copy of thew eigh-bill you gave to Mr. Börs at the time you delivered him the ship's receipts for 135 tierces of lard?

A. Yes, sir; that is a copy.

(Paper offered in evidence and marked "Plaintiff's Exh. No. 3.")

Riley P. Wilson recalled and direct examination continued.

By Mr. TRACY:

Q. The question was raised yesterday in this contract whether the words used were Western lard or Wilcox lard; will you tell us how the advances had been made, whether according to the price of Western lard or Wilcox lard?

A. The Western lard.

Q. Which was the highest in the market?

A. Wilcox's lard.

Q. If it had been Wilcox's lard your advances would have been larger than they actually were?

A. Yes, sir.

79 Q. And you claim what is the price of Western lard?

A. Yes, sir.

Q. That had been the course of business?

A. Yes, sir.

Cross-examination by Mr. FORSTER:

Q. Whom did the firm of Wilson & Son, to whom this communication of Feb. 8th, 1876, was addressed, consist of?

A. Myself and my son.

Q. Were they the only partners?

A. Yes, sir.

Q. What is your son's name?

A. Odell.

Q. What is his age?

A. He was a little over twenty years.

Q. He was under age, wasn't he?

A. Yes.

Q. When was this partnership of Wilson & Son formed?

A. The year previous.

Q. After the lard had been sold on the other side, were you and your son sued by Börs to recover the unpaid balance of the advances?

A. I believe we were.

Q. Did your son set up as a defense to that suit that he was a minor and under age at the time of the transaction?

80 A. He was a minor at that time.

Q. Did he set that up as a defense to that suit?

A. I set it up for him. It was the fact, that was all.

Q. You employed the counsel who set up that defense in his name?

A. Yes, sir.

Q. How long have you continued in partnership with him, ever since?

A. Yes, sir.

Q. And under what other names besides the names Wilson & Son?

A. No other name.
Q. Were not you in partnership under the name of O. Wilson & Co.?
A. That is the same person.
Q. Your concern changed its name from Wilson & Son to O. Wilson & Co., did it not?
A. That is my son and myself.

By the COURT:

Q. Did your firm have different names at different times; if so, what were they?
81 A. When we changed our business to the butter manufacture we assumed that name.
Q. You changed the firm-name when you changed your business?
A. Yes, sir.

By Mr. FORSTER:

Q. What you call the butter manufacturing business was conducted under the name of O. Wilson & Co., was it?
A. Yes, sir.
Q. O. Wilson being your son and the Co. being you yourself?
A. Yes, sir.
Q. That was for the sale of oleomargarine for butter, was it not?
(Objected to as irrelevant; objection sustained; question excluded; exception duly taken by the defendant.)
Q. Your place of business was at No. 188 West Houston street at that time for that business?
A. Yes, sir.
Q. Were you not tried at special sessions for selling this oleomargarine for butter in October, 1877?
(Plaintiff objects as immaterial and irrelevant; objection sus-
82 tained; evidence excluded; to all which defendant duly excepted.)
Q. Where was your place of business on the 8th of Feb., 1876, in this lard business?
A. I think, No. 188 West Houston street.
Q. Were both businesses carried on at the same place at that time?
A. No, sir; we did not carry on the other business then.
Q. When did you commence carrying on what you call the butter business?
A. It was in the fall of the year 1876.
Q. When did you commence the manufacture of this lard; refining of lard at 188 West Houston street?
A. Some time in December, I think, in the year 1875.
Q. Did you give up refining lard when you went in the butter business?
A. I did, sir.
Q. How long did you continue in the butter business?
(Objected to by plaintiff; excluded; defendant duly excepted.)
Q. What is your business now?
A. I am engaged in mining and reduction works in Colorado.
Q. How long have you been in Colorado?
83 A. A little over a year.
Q. When did you leave New York?
A. A year ago last June.

Q. What was your business immediately before leaving New York?
A. Butter business; I sold that out.
Q. You continued in this butter business until you left New York a year ago last June?
A. Yes, sir.
Q. That is till June, 1878?
A. Yes, sir.
Q. Did you have any place of business except No. 188 West Houston street from the time you opened that place of business in December, 1875, till you left New York in June, 1878?
A. No, sir; except our factory in Houston street.
Q. You had no other place of business than 188 West Houston street from December, 1875, to June, 1878?
A. No. 188 and 190 West Houston st.
Q. You never had any other place of business during that period?
A. No, sir.
Q. And in June, 1878, you left New York and have not had any place of business here since?
84 A. My business is in Colorado.
(Q. Repeated.)
A. No, sir.
Q. Do you remember what day of the week the 8th of Feb. was, when you called at Mr. Börs' office and received this paper—plaintiff's Exh. No. 1?
A. I don't remember the day of the week.
Q. You remember calling there?
A. Yes, sir.
Q. How long were you at Mr. Börs' office on that occasion?
A. I could not tell how many minutes; not now. I was never there a great while.
Q. You were there a short time?
A. Yes, sir.
Q. Was this paper written while you were there?
A. Yes, sir.
Q. Did you see it written?
A. Yes, sir.
Q. Who wrote it?
A. His clerk wrote it, Mr. Maziere.
Q. It was written by Mr. Maziere in your presence?
A. Yes, sir.
Q. Mr. Maziere was there at the time?
A. Yes, sir.
Q. This gentleman here? (Pointing.)
A. Yes, sir.
Q. Had you been personally at Mr. Börs' office at any time before
85 that occasion?
A. Yes.
Q. When before that?
A. Several times.
Q. How many?
A. I cannot tell passing through the negotiation with regard to the lard, the shipping of lard.

Q. How many times before the 8th of February, when this paper was written and signed, were you present at Mr. Börs' office with regard to this particular business?

A. Probably three or four times; I cannot tell exactly.

Q. Did you see Mr. Börs and Mr. Maziere there each time?

A. Mr. Börs I don't know; there were two gentlemen there.

Q. Did you see this gentleman (pointing), Mr. Börs' clerk, there at this time?

A. I think I did.

Q. Did you see Mr. Börs himself each time you were there?

(Objected to as immaterial; excluded; exception duly taken by defendant.)

Q. When was the first time—how long prior to the 8th of February was the first time you were in Mr. Börs' office about this business?

86 A. I think the latter part of January some time; I cannot remember the date.

Q. Was it more than ten days before the 8th of February?

A. It may have been.

Q. Was it more than ten days before?

(Objected to; is irrelevant; excluded; exceptions duly taken by defendant.)

Q. Do you know whether or not Mr. Preston, prior to the 8th of February, called on Mr. Börs about this business?

A. I believe he did once.

Q. Did he tell you that he had called?

A. I think he called with me at one time.

Q. Prior to the 8th of February?

A. Yes, sir.

Q. Didn't he tell you that he had called there himself?

A. I don't recollect.

Q. Didn't he tell you that he had called on Mr. Börs twice before you went there at all?

A. I don't recollect that he did.

Q. Didn't he tell you any of the interviews he had had with

87 Mr. Börs with regard to this lard business?

A. Mr. Börs was in Mr. Preston's office once.

(Q. repeated.)

A. I believe he had one interview with him.

By the COURT:

Q. Did Mr. Preston tell you about any interview?

A. Yes, sir; he said he had had one.

By Mr. FORSTER:

Q. Did he tell you when that interview was?

A. I cannot answer that.

Q. Did he tell you what Mr. Börs had said to him at that interview?

A. That he rather discouraged the shipment of lard.

Q. That Mr. Börs discouraged him from shipping lard?

A. Yes, sir.

Q. Did you say what I understood you to state?

A. I don't understand the question.

By the COURT:

Q. What do you mean to say, that he discouraged you or discouraged Preston from shipping lard?

A. He discouraged Preston.

By Mr. FORSTER:

88 Q. He discouraged you from shipping the lard?

A. Mr. Preston was to make the advances as a merchant. He discouraged the shipment of lard at that time.

By the COURT:

Q. Well, he discouraged everybody?

A. Yes, sir.

By Mr. FORSTER:

Q. You understood at that time that Mr. Börs discouraged Preston from shipping lard?

A. He discouraged me.

Q. Discouraged you?

A. Yes; pretended to.

Q. And during the interview you had with him he discouraged you from shipping lard?

A. He did at first, until I made him a proposition which he accepted.

Q. Until the 8th of February?

A. Yes, sir.

Q. Up to the 8th of February his advice was against the shipping of lard, was it?

(Objected to as immaterial; objection sustained; exception duly taken by defendant.)

89 Mr. FORSTER. If your honor please, I have received here a certificate from Dr. Lee, the physician of Mr. Börs, stating that he is ill in bed from inflammatory rheumatism, and will be unable to leave his house for several days. I desire to present that certificate and ask leave to withdraw a juror, and that this action may go over until Mr. Börs may be able to attend.

The COURT. If the defendant had been taken sick after the trial commenced, and was to be a necessary witness, I should permit you to withdraw a juror, but that does not seem to be the case. The motion is denied on the ground that no proof has been offered showing that the defendant has been taken ill since the commencement of the trial.

Mr. FORSTER. Will your honor give me an exception?

The COURT. It is not a matter of exception. You have my ruling.

90 Q. Now, you have stated that on the 16th of February you made a consignment of one hundred tierces of lard. What did you do in making that particular consignment?

A. On the 16th?

Q. Yes, sir.

A. I did the same as I had been doing.

Q. That was the very first shipment that you have testified to. Had you made any shipments prior to the 16th of February?

A. That was the first, I believe.

Q. You had not made any prior to that?
A. No, sir.
Q. You stated that that was the first you made?
A. Yes, sir.
Q. What did you do in making that consignment; what was the first thing you did?
A. I delivered the lard.
Q. Wasn't the first thing you did to turn the lard out from some place or other; where did you deliver the lard?
A. Over to the docks from my factory.
91 Q. On what day did you deliver them?
A. It must have been a day preceding.
Q. That is, the 15th of February?
A. Yes, sir.
Q. You delivered it there.
A. Yes, sir.
Q. What else did you do?
A. After receiving the ship's receipts and the weigh-bill——
Q. You received the weigher's receipt and ship's receipt?
A. Yes, sir.
Q. Anything else?
A. I presented them to Mr. Börs with the bill of goods.
Q. That is the weigher's receipt and the shipper's receipts, with the bill of goods?
A. Yes, sir.
Q. Did you bring him any sample?
A. Yes, sir.
Q. Who weighed that shipment?
A. The first shipment was weighed by Amolong & Co.
Q. Have you their weigher's certificate?
A. I think it is in evidence here.
Q. Of that first shipment?
A. Yes, sir.
Q. How many samples of that first shipment did you take to Mr. Börs with the weigher's return and the ship's receipt?
A. Only one.
92 Q. One sample; what was that contained in?
A. I don't remember.
Q. You took the sample with the weigher's receipt?
A. Yes, sir.
Q. Did he examine the sample while you were there?
A. Yes, sir.
Q. Did he give the check before you left?
A. He did.
Q. He examined the sample, took the weigher's return and ship's receipt and gave you a check?
A. Yes, sir.
Q. Did you give that check to Mr. Preston?
A. I was owing him, and I handed him the check.
Q. Answer the question.
A. Yes, sir.

Q. Is that the check? (Handing witness check.)
A. Yes, sir.
Q. Is that your indorsement on it?
A. Yes, sir.
Q. Is that Mr. Preston's indorsement on it also?
A. Yes, sir.
(Check offered in evidence, being check drawn by Christian Börs, dated New York, February 16th, on the Bank of New York. National
93 Banking Association pay to the order of Wilson & Son four thousand dollars; endorsed Wilson & Co., for deposit. William J. Preston.)
Q. When did you say was the next consignment you made?
The COURT. We must limit this inquiry. We cannot go further into this inquiry. The only question is about this last lot of lard.
Q. In how many different vessels was the lard which you consigned shipped?
(Objected to as immaterial and irrelevant; objection sustained; exception duly taken by defendant.)
Q. Were the consignments of the 1st, 7th, 16th, 23rd, and 29th of March, to which you have testified, made in precisely the same manner as that of the 16th of February to which you have testified?
A. All alike.
Q. All made in the same way?
A. Yes, sir.
Q. You took up a weigher's return, a ship's receipt, and a sample
94 and received a check from Mr. Börs?
A. I did not always take the sample.
Q. Answer my question.
A. I am answering it.
Q. You did not always take a sample?
A. No; because their own inspector took it.
Q. In how many of these five cases did you take a sample and in how many did you not?
A. I only remember of taking a sample once.
Q. In each of the other cases that you did not take a sample, did you take up the ship's receipt and weigher's return and get a check before you left the office?
A. Yes, sir.
Q. These are the checks (handing witness several checks), are they not, received?
A. Yes, sir.
(It is admitted that all these checks were received by Mr. Preston.
Checks read in evidence, being one dated March 2nd, for $4,200.00; March 7th, for $6,200.00; March 16th, for $4,000.00; March 23rd,
95 for $6,600.00; and March 29th, for $6,300; drawn to the order of Wilson & Son, and endorsed "William J. Preston." Marked respectively Defendant's Exh's 1 to 6, inclusive.)
Q. Are these the ship's receipts that you took up? (Handing witness several papers.)
A. Yes, sir.
Q. And are these the weigher's returns for which you received the checks of March 16th and 29th, which have been marked 4, 5 and 6?

A. These are the ones.

(Papers offered in evidence and marked Defendant's Exh's 7, 8 and 9. Insert them.)

Q. You obtained these receipts yourself?

A. Yes, sir.

Q. And took them to Mr. Börs' office?

A. Yes, sir.

Q. The first he knew of any of these shipments was when you came there with the ship's receipts and weigher's receipts, and when you brought a sample?

A. Yes, sir.

By the COURT:

96 Q. He did not know that the lard was shipped when you came there with these receipts?

A. No, sir.

By Mr. FORSTER:

Q. He knew that you proposed to ship the lard by this vessel, the August André?

A. Yes, sir.

Q. That is the vessel by which the lard in controversy was shipped?

A. I believe that was the first vessel?

Q. Wasn't that the last vessel?

A. I don't remember.

Q. Don't you know that the lard in question was shipped by the Auguste André?

A. I don't remember; the receipts show.

Q. Look at that receipt (handing witness paper), and see if that is not the receipt for the lard in controversy.

A. That is correct.

Q. Now, these 3 receipts of the 16th, 23rd, and 29th were by the same ship and the same voyage, were they not?

A. I suppose they were.

Q. Don't you know it to be so, Mr. Wilson?

97 A. I didn't pay any attention to that. I just delivered the lard and did not know what vessel it was going on.

Q. Didn't you look at the receipts which you handed to Mr. Börs?

A. Yes, sir.

Q. Didn't you know that these three receipts, March 16th, 23rd, and 29th were on the same vessel?

A. I did not know whether they were going to divide the cargo or not.

Q. Didn't you notice that they stated what vessel they were going on?

A. They always state that.

Q. Do you mean to say that you did not know that those shipments were going by the same vessel as that of the 8th?

A. I did not know whether they were all going in that vessel or not. There was a lot of it on the dock.

Q. Now, on the 8th of April, 1876, did you attend to the shipment of that 135 tierces of lard yourself?

A. I did.

Q. You saw it at the vessel?

A. I did.
Q. And got this receipt?
A. Yes, sir.
98 Q. What time in the day did you get this receipt?
A. I could not tell exactly, but I think it was in the afternoon some time.
Q. What time in the afternoon?
A. I could not tell; I don't remember. I did not charge my mind with it.
Q. Did you take any sample up with that receipt?
A. No, but Billy was there.
Q. Answer the question.
A. No, sir; I did not.
Q. Whom did you see when you called at that office with that receipt?
A. Mr. Maziere.
Q. Did you see anybody else?
A. The book-keeper, I think, was there.
Q. Mr. Youngberg was there?
A. I don't know what his name was.
Q. You saw him?
A. Yes, sir.
Q. Did you have any conversation with Mr. Maziere on that occasion?
A. I presented these vouchers for the money.
Q. You presented the weigh-bill and this receipt?
A. Yes, sir.
Q. Did Mr. Maziere say to you on that occasion that they found
99 the lard you had sent on board that vessel, by sampling it themselves, was watered?
A. No, sir, he didn't say anything about it.
Q. Didn't he say anything about watered lard to you?
A. Not a word.
Q. Didn't he ever?
A. I don't remember that he ever did.
Q. Did anybody in your office ever say anything to you about watered lard?
A. On the following Monday Mr. Börs spoke of it.
Q. On the following Monday Mr. Börs told you that the lard was watered?
A. Yes, sir.
Q. Are you confident what day of the week this 8th of April was that you called?
A. Saturday.
Q. You called there Saturday in the afternoon?
A. Yes, sir.
Q. You didn't see Mr. Börs there then?
A. No, sir.
Q. You didn't see him there that day, did you?
A. No, sir.
Q. And I understand you to say that all that took place was
100 that Mr. Maziere told you that Mr. Börs was sick, and you could not get your check that day.

A. He said that I could have it on Monday.
Q. He said you could not have it that day?
A. It would not be finished, he said.
Q. Did he tell you you could not get a check that day in consequence of Mr. Börs' sickness and absence from the office?
A. He said that I could not have it until Monday, but that Monday I could have it.
Q. By reason of Mr. Börs' sickness and absence from the office?
A. So he said.
Q. Do I understand you to say that they were shown samples of those 135 tierces of lard?
A. I suppose they must have been.
Q. Do I understand you to say that *you* were?
A. I don't know what their inspector had done; I understood they always presented them.
Q. Whom did you understand anything of that sort from?
A. I know the inspection was always made.
101 Q. My question is, do you know whether on that Saturday when you were there they had any samples of this 135 tierces of lard?
A. I could not swear to that.
(Ship's receipt of April 8th offered in evidence and received, marked "Defendant's Exh. 10" Insert it.)
Q. Now, I understand you to say that you called again on Monday morning.
A. Yes, sir.
Q. What time on Monday?
A. 11 o'clock.
Q. Did you see Mr. Börs there?
A. I did.
Q. Did you see Mr. Maziere there?
A. I did, sir.
Q. How long were you there on that occasion?
A. A few minutes; I cannot tell exactly how long.
Q. Did Mr. Börs then tell you that he had had the other three lots of lard examined, and found them to contain 25 per cent. of water and only three-quarters lard?
A. No, sir; he did not.
Q. Didn't he offer to return to you the receipts of the shipments by the Auguste André, including the shipment in question, and demand
102 the return of his advances on the ground that the lard was watered to the extent of nearly 25 per cent.?
A. He said he would do it; he didn't demand it.
Q. He said he would do it?
A. Yes, sir.
Q. He offered to do it?
A. Yes, sir.
Q. And put that offer on the ground that the lard was watered, didn't he?
A. He said that that sample was watered.
Q. The samples of lard that he had taken showed that the lard was watered?

A. No; he didn't say that.

Q. What sample did he say was watered?

A. He had a sample there which showed some water in it, but where he got it I don't know.

Q. You say that it was watered?

A. Yes, sir.

Q. It had been treated so as to detect whether there was water in it or not?

103 A. There was some small proportion of water, I don't know what.

Q. Didn't he show you a certificate of a chemist to whom that sample had been submitted?

A. No, sir.

Q. The certificate of Waltz & Stillwell?

A. No, sir.

Q. Didn't he tell you that he had had it submitted to chemists and analyzed, and found that it was watered?

A. No, sir.

Q. He simply showed you the sample, and you saw the water in it?

A. I saw a few drops of water in the bottom of a tumbler.

Q. That was the ground on which he offered to return the receipts and wanted his money back, was it not?

A. I suppose that was the reason.

Q. That was the ground he had put it on. He told you that he had found that it was a swindle?

A. No, sir.

Q. Didn't he tell you that he found out you had undertaken to swindle him in regard to this last shipment by the Auguste André?

A. He made some remarks—was very much excited.

104 Q. That was the substance he told you, you had swindled him?

A. He said a great many things.

Q. Didn't he say that?

A. He might have.

Q. Didn't he tell you that the first shipment made in February and the shipment made on the 2nd and 7th of March were good lard and free from adulteration, but that these shipments by the Auguste André were watered to the extent of 25 per cent., and that it was a swindle?

A. He never said a word to me about any difference in a shipment, not a word.

Q. Didn't he tell you on that occasion that the first two shipments were free from adulteration?

A. No, sir; not a word.

Q. And that you had swindled him in that way by making him small shipments at first, which were good, bringing him samples, and then making these shipments; that he examined the samples and found

105 the lard was watered?

A. He did not say any such thing.

Q. When he told you that he found the lard was watered and wanted to return the receipts and get back his money, what did you say?

A. I told him that it was false; that I had not watered the lard; that every sample of lard was made exactly alike, every pound of it.

Q. That is what you told him?

A. Yes, sir; and that was fact, too.
Q. When he said that what did you say to him?
A. I told him that it was false; that there was no water in the lard, as far as I was concerned.
Q. Did you say anything else?
A. I wanted him to carry out his contract according to agreement.
Q. Did you say anything else?
A. I don't remember.
Q. What did he say?
A. That he would not make the advance; he refused to give me a check.
Q. Give us all that was said.
A. I demanded the return of the lard, but he said he would not return it to me.
106 Q. Was there anything else said on that occasion?
A. That is the gist of it.
Q. You mean to be positive that he not tell you that you had swindled him and that you had watered the lard, do you?
The COURT. He says in substance that he did tell him so.
Q. You didn't say anything to him further than you have testified to on your direct and cross-examination, at this interview?
A. Nothing different from what I have stated that I remember.
Q. What did you personally have to do with the manufacture of this lard that was shipped by the Auguste André?
A. I had charge of it.
Q. Did you personally do the refining of it yourself?
A. I had my men.
Q. You didn't personally do it?
A. I superintended it.
Q. Did you see the lard refined?
A. Certainly I did.
Q. How much lard did you refine in that month of March?
A. I could not tell till I look at my books.
107 Q. Where are your books?
A. In Colorado.
Q. You took all your books of this lard refining business out there when you went out there in June, didn't you?
A. We took all our books along.
Q. Did you take your books of this lard refinery out there, when you went out there in June?
A. No; my son moved out; he kept the books and when he moved out he took the books with him, in the following September.
Q. Where is your son now?
A. In Colorado.
Q. And all your books of this lard business are out there too?
A. Yes, sir.
Q. Now, did you refine any of the lard in March except what you delivered on board this Auguste André?
A. I think he took all we did in March.
Q. You mentioned a man by the name of Billy in your direct examination, whom did you say he was?

A. I don't know who he was; Rouse, Goullard & Co. employed him.

Q. They were lard inspectors?

108 A. Yes, sir.

Q. And he was the man that took the samples, as you understand, of this lard?

A. Yes, sir.

Q. How was the lard branded?

A. I think it was "W."

Q. Wilson & Son's lard, was it not?

A. I think it was just "W."

Q. It was known as Wilson & Son's lard?

A. Yes, sir.

Q. Did you ever make any further shipments to Antwerp except these through Mr. Börs?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Whom do I understand you to say Billy took samples for? Mr. Börs or you?

A. Rouse, Goullard & Co., who were Mr. Börs's inspectors.

Q. Whenever Billy took samples, then, he took them for Mr. Börs and not for you, is that it?

A. Yes, sir.

Q. Who took the samples that you took?

A. I took them myself.

Q. In your direct examination you said something about Mr. Börs's inspector, did you refer to Rouse, Goullard & Co. then?

A. Yes, sir.

109 Q. Did you see Mr. Börs between the 29th of March, when you presented the ship's receipt for 140 tierces and received a check, $6,300.00, and the 8th of April, when you presented the receipt for the 135 tierces?

A. I don't remember.

Q. You don't remember that you did?

A. I don't remember.

Q. You have no recollection of seeing him between the occasions?

A. I do not remember; no, sir. I might.

Q. I understand you to say something as to when you saw Mr. Börs on the 10th of April, with regard to sickness; what did you say in that regard?

A. I don't understand your question.

Q. I want to know if yesterday, when you were examined by Gen. Tracy, you said anything about sickness in regard to Mr. Börs, when you saw Mr. Börs on the 10th of April?

A. I don't think I said anything then.

Q. You don't think you said anything yesterday in respect to this sickness on the part of Mr. Börs in connection with the 10th of April?

110 A. In connection with the 8th I said that they said that he was taken sick.

Q. You said that on the 8th Mr. Maziere told you Mr. Börs was sick?

A. Yes, sir.

Q. You saw Mr. Börs on the 10th?
A. Yes, sir.
Q. Did you give any testimony yesterday in regard to his sickness on Monday?
A. I might have said that he did not look like a sick man.
Q. Did you say anything else on that subject yesterday?
A. It is in the testimony, I suppose; I don't remember.
Q. You don't remember whether you said anything further than that or not?
A. No, sir.
Q. You testified here with regard to the weigh-bill of 135 tierces on the 8th of April; have you the weigh-bills of the other three lots that went by that same vessel?
A. I got them at the time and presented them.

Q. Didn't you have one similar to the one you had yesterday?
111 A. I had a copy of it; Rouse, Goullard & Co. always give us copies; the original went to Mr. Börs.

Q. Did you execute any written assignment to Mr. Preston on the 11th of April?
A. I did; yes, sir.
Q. A written assignment?
A. Yes, sir.
Q. Who drew that written assignment?
A. I don't remember who did draw it.
Q. You are confident that you executed a written assignment to him, are you?
A. Yes, sir.
Q. Where was that executed?
A. In Mr. Preston's office.
Q. Are you sure that it was executed on that day?
A. Yes, sir.

(Mr. Forster moves to strike out the witness's evidence of the assignment until the written paper is produced; motion denied; defendant duly excepted.)

Q. Is that your handwriting on the paper I now show you? (Handing witness paper.)
A. Yes, sir.
(Paper is marked for identification, "Defendant's Exh. A.")

Redirect by Mr. TRACY:

Q. Do you say that that assignment is in writing?
112 A. I am not absolutely sure that it was a written assignment I made.

Q. Do you pretend to say that you executed any written assignment to Mr. Preston, or was it an oral assignment?
A. I could not say positively, it was so long since.
Q. Wasn't it made in Mr. Preston's office?
A. Yes, sir.
Q. Where was the arrangement made?
A. In Mr. Preston's office.
Q. In the presence of Mr. Cook, his book-keeper?
A. Yes, sir.

Recross by Mr. FORSTER:

Q. What do you mean to say now, sir, with regard to that assignment; was it a written assignment or not?

A. I may have forgotten it. It was an answer I made in the hurry of a moment. I may have said that it was a written assignment, but it was not.

Q. I want to ask you whether you mean to say now whether that was a written assignment or not?

A. I could not positively state whether it was written; it was
113 an assignment.

Q. What was done at this office that you have any recollection of now; if anything was written what was it; have you any recollection of what took place?

A. The assignment of the case to Mr. Preston was what was done.

Q. Have you any recollection of what was done on that occasion?

A. I have just told you.

By the COURT:

Q. What was said, if anything was said; do you remember what was said?

A. I told Mr. Preston I was owing him and must make this assignment to secure him.

By Mr. FORSTER:

Q. That was all?

A. That was the gist of it.

Q. Was that all you did?

A. I made the assignment, and my son was there as a witness.

Q. Did he witness the paper?

A. He was a witness to the transaction.

Q. Was there any paper or not?

A. I could not swear positively whether there was or not.

114 Q. Have you any recollection of what took place on that occasion?

A. I assigned the case to Mr. Preston.

Q. Did you do that by putting your name to something?

A. I don't remember.

Q. Do you remember how you did it?

A. It must have been verbal if it was not written.

Q. I ask you if you remember how you did it?

A. I do not.

WILLIAM J. PRESTON, being duly sworn in his own behalf, testified as follows:

Q. Mr. Preston, you are plaintiff in this case?

A. I am.

Q. When did you first make the acquaintance of Mr. Wilson?

A. Some time in the year 1875.

Q. Were you shown the contract, Ex. No. 1, by Mr. Wilson at any time?

A. I was.

Q. Did you make advances for Mr. Wilson to purchase lard for the *the* purpose of refining?

A. He gave me an order to buy lard for him, and I advanced the money.

115 Q. Was that made after you were shown this contract Exh. No. 1?

A. It was.

Q. It appears in evidence that you had checks given by Mr. Börs.

A. He brought the checks which I credited to him in his account and rendered him a statement of them.

Q. Börs' checks?

A. Yes, sir.

Q. When did you first hear that Mr. Börs refused to give a check?

A. On Saturday, the afternoon of the 8th of April.

Q. On Monday did you see Mr. Börs?

A. I do not mean to say that on Saturday, the 8th of April, I heard that he refused the check; on Saturday, April 8th, Mr. Wilson told me that he would bring me a check on Monday, the 10th of April, and on Monday Mr. Wilson came to me at about 11 or 12 o'clock and said——

Q. Well, were you informed at that time that Mr. Börs had the check?

A. Yes, sir.

Q. In consequence of that what did you do?

A. I wrote a letter to Mr. Börs saying that I had.——

116 Q. That won't do; was this letter? (Handing witness a paper.)

A. That is the letter.

Q. And is that Mr. Börs' reply? (Handing witness another letter.)

A. It is.

Q. After you wrote that letter did you see Mr. Börs?

A. I did; I went with Mr. Wilson & his son to Mr. Börs' office.

By the COURT:

Q. Was that after you received the reply?

A. Yes, sir; when Mr. Wilson had returned to my office saying that Mr. Börs had refused the check.

Q. I understand that you wrote a letter and received a written reply?

A. Yes, sir.

Q. Was it after you received that that you went to see Mr. Börs; or don't you remember?

A. I don't remember whether that answer came before I went to see him or not.

By General TRACY:

Q. You did go and see him?

A. I did.

Q. With Mr. Wilson?

A. Yes, sir.

Q. Tell us what transpired in your presence there between *between* Mr. Wilson, yourself, and Mr. Börs.

A. Mr. Wilson said to Mr. Börs, "I want the check as an ad-

117 vance upon the 135 tierces of lard for which I delivered the way-bills & shipping documents, weighers' returns, on Saturday;"

and Mr. Maziere (his clerk) said, "You were at home, sick" and requested me to wait until Monday at 11 o'clock and I could get the check. "I now make a formal demand for the advance made upon the lard, according to your agreement with me." Mr. Börs said, "I decline to make the advance;" he would not consent. Mr. Wilson said, "Then I demand the return of the lard." Mr. Börs told him that he would not return him the lard. Mr. Börs did say, "If you will pay me back all my advances upon all the lard I have advances for you it may be sold on the other side for your account." I then told Mr. Börs that I was in advance to Mr. Wilson on this lard and that I wanted my money from Mr. Wilson, and that I thought he ought to make an advance according to the agreement.

118 Mr. Börs told me that if I would get an order from Mr. Wilson & Son for any balance that remains, and he thought there would be about $4,000 balance to the credit of Wilson & Son, an order on him for any balance in his hands on the sale of the consignment, he would pay that money over to me. I told him that that would not do; that I wanted my money. He declined and said that he must protect himself and his friends abroad; that the lard was adulterated; that, I told him, I did not know anything about *it*, and Mr. Wilson denied any adulteration of the lard. That is the substance of the interview.

Q. How much was Mr. Wilson indebted to you at this time for advances?

A. Some $6,000.

Q. What was done after that in regard to his assigning you this claim?

A. I consulted my att'y, as I felt very bad about it, and I bought from Wilson & Son the right of action, in my office, in the presence of Mr.

119 Cook, for one dollar in cash, which I delivered to him, and a very valuable consideration which the firm of Wilson & Son owed me.

Q. You are a member of the Produce Exchange, Mr. Preston?

A. I am.

Q. Were you acquainted with the market value of lard on the 10th day of April, 1876?

A. I was and am now.

Q. Cannot you now state to us what was the market value of refined lard on the 10th of April, 1876, in the city of N. Y.?

(Question objected to; objection overruled; exception duly taken by defendant.)

A. From 14½ to 15c.

By the COURT:

Q. A pound?

A. Yes, sir.

By General TRACY:

Q. Have you computed the amount of the 135 tierces according to Ex. 3, the weigher's bill, with the amount due at that price, Mr. Preston?

A. I have computed it at 14c. per pound.

Q. What does it amount to?

A. $6,401.22.

120 Q. Have you also computed the interest from the tenth of April to the present time on that amount?

A. I have.

Q. What does that amount to, what is the principal & interest, the total amount?

A. $1,796.86.

Q. That is the amount of the interest?

A. Yes, sir.

Q. Add that to the value; what does that amount to?

A. $8,198.08.

Q. After seeing Mr. Börs with Mr. Wilson did you go to the ship's office that same day, on the 10th of April?

A. I did.

Q. Did you see Mr. Edye there, the agent?

A. I did.

(It is admitted that the def't was at the time of the transaction, on the 8th of April, and is still, the consul for Sweden & Norway at this port, and has been such for a great many years.)

Cross-examined by Mr. FORSTER:

Q. Mr. Preston, were you at the office of Mr. Börs in Jan'y?

A. Yes, sir.

Q. How many times?

A. Twice; I think in the latter part of Jan'y or the fore part of Feb'y.

121 Q. Prior to the 8th of Feb'y?

A. Yes, sir.

Q. Both times?

A. Yes, sir.

Q. Do you remember when the first interview was?

A. The latter part of Jan'y, I should think.

Q. Did you see Mr. Börs on each occasion?

A. I did.

Q. Did you see Mr. Maziere?

A. He was there; my conversation was with Mr. Börs in his private office.

Q. Did you, on that first occasion call on Mr. Börs, and state to him that Mr. Walther had given you the name of Mr. Börs in connection with the shipment of lard to Antwerp, & that you wanted to talk to him about shipping refined lard to that port?

A. Not in relation to my shipping; no, sir.

Q. Did you make the remark I have stated, and introduced yourself in that way?

A. What is your question?

Q. Did you make that remark, and introduce yourself in that way?

A. I should say, no, sir.

Q. Did you state in part—make any statements that are contained

122 in that question; &, if so, which one?

A. I can give generally my recollection.

Q. I ask you if you made either one of the statements. Did you introduce yourself by saying that Mr. Walther——

By the COURT:

Q. Go on and state what you did; state as well as you can remember.

A. *When* I called on Mr. Börs at the request of Wilson & Son.

Q. Did you tell him so?
A. Yes, I told Mr. Börs.

By the COURT:

Q. You told him that you came at the request of Wilson & Son?

A. Yes, sir. I said to Mr. Börs that Wilson & Son desired to make an arrangement with me to advance them upon lard to be refined, and that they had had a conversation with him in relation to it, and I had come to consult with him about it; that Wilson & Son wanted to make a shipment of lard; that they had consulted with Mr. Börs in relation to making the shipments. Mr. Börs said that he had met Wilson & Son and he
123 said "Mr. Preston, it is a slow process establishing a new brand of lard in Europe, and it would take some time for Mr. Wilson to establish his brand, and he could not make much money to begin with nor for some time; probably he would lose some money. However," he said, "I should be very happy to advance Wilson & Son upon shipment of lard to my friends." I told Mr. Börs that I did not care to make advances upon lard for refining unless the refiners had some prospect of making money, & that I thought I would not make the advances to Wilson & Son. That is about the substance of the conversation as I now recollect it.

By Mr. FORSTER:

Q. Well, now, Mr. Preston, is not it the fact that the reference you made to Mr. Wilson was at the second conversation, and that no reference whatever was made to Wilson at the first conversation?
124 A. No, sir; I never consulted Mr. Börs, except at the suggestion and request of Mr. Wilson.

Q. I did not ask you that question; and is not it the fact that you made no mention to Mr. Börs of Mr. Wilson's name at the first conversation, but that you did at the second?

A. No, sir; it is not the fact.

Q. At your first conversation did not you introduce yourself to Mr. Börs, by stating that Mr. Walther had given you the name of Mr. Börs in connection with the Antwerp business?

A. No, sir.

Q. Did you mention Mr. Walther's name.

A. I may have mentioned, it from the reason that Mr. Wilson told me that Mr. Walther had introduced him to Mr. Börs, because Mr. Wilson had told me that fact.

Q. Can you recollect whether you did so or not, Mr. Preston?

A. I can only repeat my previous answer.

Q. You know Mr. Walther?

A. Very slightly.

125 Q. Did not Mr. Fisher introduce Mr. Walther to you at your office?

A. Yes, sir.

Q. That was prior to your calling on Mr. Börs at all, was it not?

A. I could not say that it was.

Q. Did not you have a conversation with Mr. Walther at your office in the latter part of 1875, when Mr. Fisher brought him there, in which you told Mr. Walther that you had a proposition to go into the refining business with some party, and asked him what his idea of the business was?

A. No, sir; I did not; most emphatically.

Q. Did you not have a conversation with Mr. Walther at your office about the refining of lard?

(Objected to as irrelevant and immaterial; objection sustained; exception taken by defendant.)

Q. Mr. Preston, when did you first become acquainted with Mr. Wilson?

A. I think in the early part of 1875.

Q. Had you had dealings with him before he went into this refinery business?

126 (Objected to; excluded; exception taken by defendant.)

Q. Have you the account between you and Mr. Wilson, to which you have testified?

A. I have.

Q. Is it here?

A. No, sir.

Q. Where is it?

A. In my books at my office.

Q. When did your first advance to Mr. Wilson on lard commence?

A. After the first of Feb'y.

Q. What was the date of the first advance that you made?

A. Well, to the best of my recollection, it was the 10th or the 11th; somewhere along there.

Q. What was your business at that time?

A. Commission merchant.

Q. Were you a dealer in lard?

A. A commission merchant.

Q. Were you dealing in lard?

A. As a commission merchant; buying and selling for account of others.

Q. Did you furnish any lard for him?

A. I bought lard for him.

Q. Any Western lard?

A. I bought Western lard for him.

Q. That was consigned to you?

A. No, sir.

127 Q. You furnished him none that was consigned to you?

A. I did not.

Q. Do you know what was the price of Western lard on the 16th of Feb'y, 1876?

A. I have got the market report with me published by authority of the Produce Exchange.

Q. Here?

A. Yes, sir.

Q. Published by who?

A. By the managers of the Produce Exchange.

Q. Is that what you testified from when you gave the value of refined lard?

A. That refreshed my memory; yes, sir.

Q. Did you deal in refined lard at that time?

A. My transactions in lard are mostly in steam-rendered lard—standard steam-rendered lard—which is converted into refined lard by refining.

Q. Did you have any dealings at that time in refined lard?

A. I don't remember that I did.

Q. Had you any knowledge of the value of lard at that time, except that which was derived from your dealings in Western lard and what you may have read in these price-currents?

128 A. Also from what buyers and sellers of refined lard informed me of the prices bearing on the market.

Q. What was the price of Western lard on the 16th of Feb'y, 1876?

A. I shall have to refresh my memory by looking at the market reports, except I can look at my bills of purchase of lard made for Wilson at that time, if you say.

Q. Look at anything you please and state what it was.

A. (Referring to memorandum.) Feb'y 24th, I bought from David Dows & Co. for Wilson & Son, Western steam lard, at $13\frac{7}{16}$c.

Q. What other transaction did you have in lard between that date and the 11th of April?

A. I bought 250 tierces of lard.

By the COURT. I don't think it is worth while to go over all these transactions.

(Answer continued.) On Feb'y 9th, 1876, at $13\frac{5}{16}$ per pound.

129 Q. Don't go back. I asked you between the 16th of Feb'y & 11th of April. The first one you gave was the 16th. Now I ask you to go forward and state all the transactions that you had in lard between that and the 11th of April.

A. I could not do that.

Q. State as well as you can.

By the COURT. No, you need not do that.

A. From the first to the 15th of April I bought 2,100 tierces.

Q. At what price?

A. I do not think I can give the prices here.

By General TRACY:

Q. You can approximate the prices.

A. April 7th, $15\frac{3}{8}$c.; that was for stearine that goes into refined lard.

By the COURT:

Q. Is that refined lard?

A. Lard with the oil pressed out.

By Mr. FORSTER:

Q. Stearine is something else than refined lard?

A. The more stearine there is the better the lard is.

Q. It commands in the market 2 or 3c. per pound higher than what is called refined lard?

A. No, sir.

Q. There is a difference in price, is there not?

A. Yes, sir.

Q. What is it?

A. From 1c. to $1\frac{1}{2}$c., perhaps.

130 Q. Give us the prices of refined lard; that is what I want.

A. On the 4th of April I bought for the account of Wilson & Son refined lard at $14\frac{30}{100}$c., from Fowler Bros., a standard firm. April 3rd, No. 1 set-lard, at $13\frac{3}{10}$c. per pound—22 tierces.

Q. Can you give anything nearer April 8th?

A. April 3rd; also from Fowler Bros., at $14\frac{3}{10}$c. per pound.

Q. Have you anything between that and the 11th of April?

A. Feb'y 9th, $13\frac{3}{4}$c. per pound.

Q. Have you got anything between the 11th and the 3rd of April? Don't go back of that.

April 6th, stearine $15\frac{3}{8}$c. per pound.

Q. Now, Mr. Preston, if pure refined lard is worth 14c. on the 15th of April, how much is lard adulterated with 20 per cent. of water worth—if it had 20 per cent. of water & 80 per cent. of lard?

A. Pure refined lard has some water in it.

Q. How much would it be worth?

A. It would be worth 20 per cent. less.

131 Q. Would not it be worth more than that; does not it cost something to refine pure refined lard; does not it cost something to get the water out of adulterated lard?

A. I can only speak from my opinion about it.

Q. That is all I ask.

A. I should say it would.

Q. In the interview that you had with Mr. Börs—in one of the interviews that you had with Mr. Börs, prior to the 8th of Feb'y, did not he speak to you and call your attention to the necessity, in shipping lard to Antwerp, that it should be pure refined lard, because they had not the materials there to refine it or take any adulterating substance out.

(Question objected to; excluded; exception taken by defendant.)

Q. Did you say that your assignment is in writing?

A. It is not in writing.

Q. Well, did not you testify in Nov., on the 11th of Nov., 1876, that it was in writing?

A. I was up on an examination, I should say not now.

132 Q. Were not you asked on that examination this question, and did not you give to it the following answer (reading): "Was this assignment in writing? A. It was?"

A. No, sir.

Q. Is not that your signature? (Handing witness a paper.)

A. Yes, sir; but where is the question?

Q. Right above it. "Was this assignment in writing? A. It was."

A. No, sir; that is not my testimony.

Q. That is your signature to it, is it not?

A. Yes, but that is false. (Paper offered in evidence and marked "Ex. 11.")

Q. You remember that examination, Mr. Preston?

A. I do.

Q. Where was it taken?

A. In your office.

Q. Was it taken in our office or in the office of your counsel, the office of Tracy & Catlin?

A. I think it was.

Q. Were these accounts of the sale of this lard rendered to you? (Handing witness two papers) *Q.* Don't you remember the rendition of these accounts to you?

A. Not that I know of.

133 (Papers are marked for identification "Def'ts Ex. B, & C, respectively.)

Q. Was this letter written by you? (Handing witness a letter.)

A. Yes, sir.

Q. The accounts referred to in that—are they not these accounts I showed you a few minutes ago?

A. That I could not swear to.

Q. What is your best recollection?

A. I could not say, sir.

Q. Did you look them over?

A. I have examined them; my letter says——

Q. I know what the letter says; I propose to read it after Gen. Tracy has examined it. Do you recollect now that this is your statement of the sales of this lard?

A. The statement is of some lard sent to them.

Q. This lard?

A. It may be, and may not.

Q. Don't you recollect that it was the statement of the sales of this particular lard?

A. It may have been, & may not.

Q. Don't you recollect whether it was or not?

A. I don't remember.

Q. Just look at the date of these accounts; what are they dated?

134 Q. Look and see who these accounts are signed by. After looking at the dates of these accounts, and the parties they are signed by, can't you identify them sufficiently to say whether or not you received the account of the sales of the lard on Jan'y, 1877?

A. I don't know; I cannot tell: that might be, and might not be; I could not swear to anything more than that; I cannot see what more you can ask me to swear to.

(Letter marked "Exh. D," for indentification.)

Q. Do you recollect whether shortly before or on the 16th of January, 1877, you received the account of sales of this lard in Antwerp?

(Objected to; excluded; exception taken by defendant.)

Q. These several checks that were put in evidence were all of them, I understand, received by you on the same day they bear date?

A. I think they were.

Q. Did you see any of the weigher's returns for any of this lard at any time?

A. I think likely I did.

Q. For all of it?

A. I may.

135 Q. What is your recollection or that subject?

A. Well, it is my recollection now that Mr. Wilson came into my office with the ship's receipts, these dock receipts, for the lard, and the weigher's returns.

Q. Did you take any of them up to Mr. Börs' office?

A. No, sir.

Q. Or send any of them up to Mr. Börs' office by any of your people?

A. Yes, sir.

Q. Mr. Wilson brought them into your place before you got the check, and you went over there with him, read them over with him, and saw what was in them?

A. Yes, sir.

Q. Was it on the production of those papers that you made the advances to him?

A. My advance was upon the material; to the refined Western lard, and stearine which he put into refined lard.

Q. My question is whether you made the advance when Mr. Wilson showed you the weigher's return and the ship's receipts?

A. My advances were made prior to that.

136 Q. What was the date of the first advance you made to him?

A. I recollect now, about the 4th of April.

Q. (Handing witness a letter.) Is that letter written by you?

A. It is.

Q. Have you the letter to which this is an answer; the letter referred to in that?

A. It is quite likely I have; I have not it here. I have a copy of this letter here.

Q. A copy of this letter here, but not the original letter from Mr. Börs' office to which this is a reply; is that it?

A. That is it, sir.

Q. Did you ever go to that office mentioned in that letter?

(Objected to; objection sustained; exception taken by defendant.

Letter offered in evidence marked "Defendant's Exh. No. 12." Insert it.)

Q. Don't you know it is a fact that Mr. Wilson didn't have any office at that place?

A. I know that he told me he did have an office there.

Q. You have heard his testimony, have you not, that the only office he had was No. 188 West Houston street?

137 A. Mr. Wilson told me that his office was at that place.

Q. Don't you know that he could not be found there?

A. No, sir.

Q. You never went there for him, did you; never saw him there, did you?

(Excluded; exception taken by defendant.)

Q. When did you first hear anything about this lard being watered?

A. From Mr. Börs.

Q. On what day?

A. On the 10th of April, 1878.

Q. What did he say as to how much it was watered?

A. He did not say how much; he said it was adulterated with water.

Q. Didn't he say that the lard had been examined?

A. No, sir; he did not.

Q. Didn't he say that on the whole shipment by this vessel he had already advanced, at the contract rate, more than the lard there was worth, after allowing for the amount of water that was found in the samples?

A. No; because he told me that there would be four thousand dol-

138 lars balance due Wilson, and wanted that I should get an order from Wilson to pay it to me.

Q. You are sure he did not say anything of that kind?

A. I am very positive about that; that he didn't say so.

Q. Are you sure he didn't say anything about how much the lard was watered?

A. The percentage of water?

Q. Yes.

A. I don't think he did; he claimed that it was watered.

Q. Didn't he say anything with regard to being ready to return these shipping receipts and receive the advances he had made on the first three?

A. He did not; he did not offer to do it.

Q. When you went there he had the four shipping receipts by the Auguste André, including one of the 8th of April?

A. He did not present one of them.

Q. He had them all, didn't he?

A. Not to my knowledge.

Q. Didn't you understand they had all been left with him, including the one of April 8th?

A. I did.

139 Q. Then you knew that he had them, did you not?

I also supposed he delivered them up to the steamship company at the time he got his bill of lading, and I was so informed by the steamship line.

Q. You say that you are a member of the Produce Exchange; was this question ever brought up before the Produce Exchange—this controversy?

A. Not to my knowledge; not that I was at all a party to.

Q. How have you made this computation on this lard at 14 cents a pound; how many pounds have you taken there to be on this lard?

A. I have taken the net amount; the gross amount of lard is 53,707 pounds; tare, 7,984, leaving net 45,723 pounds; that I have multiplied by 14 cents, and added interest at 7 per cent. up to 30th of December, and six per cent. from that time until to-day.

Redirect examination:

Q. Mr. Preston, I hand you a copy of your testimony, taken on the examination before trial, and ask you if this is the copy that you have had?

A. It is.

140 Q. Will you read the question and answer as to whether that assignment was in writing or not?

A. (Reading:) "Q. Was this assignment in writing?—A. It was not."

Q. Now, sir, did you ever know before to-day that the copy you signed for the counsel omitted the word "not" in that answer?

A. Never till now; and I want to say that the questions below show that that was my answer: "Q. In what language was the assignment made above?—A. I said to Wilson & Son that I would buy their right of action for one dollar cash, which I handed to Wilson & Son, and the other consideration, which was money advanced by me to them." That shows it is a clerical error in the paper.

Q. Now, Mr. Preston, in this interview between Mr. Börs and Mr. Wilson, when you were present on the 11th, was there anything said in

regard to the 135 tierces of lard being watered, or did the conversation relate to the previous assignment? Q. What did he say on the sub-
141 ject of the lard being watered; what sale did he speak of?

A. He spoke of the shipments of Wilson prior to this, and had some samples there, which he showed.

Q. Did he claim to have made any test of the 135 tierces in question?

A. Not any.

Mr. TRACY. I offer in evidence a letter, which has been identified, from Mr. Preston to Mr. Börs, and Mr. Börs' reply. Letters marked respectively Plaintiffs' Exh's Nos. "4" and "5."

(Insert plaintiffs' exhibits, 4 and 5.)

Cross-examined by Mr. FORSTER:

Q. Give all the conversation, the language used, or the substance of it, that was used in regard to watering the lard; who said it, and when, and all that was said by any party present at that time.

A. I could not give the language.

By the COURT:

Q. Give as much as you can.

A. Mr. Börs said that the lard was adulterated by water; that
142 his friends on the other side, at Antwerp, had so cabled him that it was adulterated, and that it would not sell at the price of Wilcox's lard. I told him I knew nothing about that at all; then he brought some samples of lard; but at that time I knew nothing about the process of refining lard, and I could not enter into the discussion intelligently. He told me about a cable that he had received of the lard that had arrived out; that that was what was creating the fuss, and not the lard that was here.

Q. Was there water in the samples of lard he showed you?

A. Yes, sir; I should think it was watered.

Q. Didn't he state that these were samples taken from the lard on the Auguste Andre?

A. He claimed they were samples of the Wilson lard.

Q. Didn't he state that they were samples he had taked from the lard on the Auguste Andre at that time, at Jersey City?

A. I should say no, sir.

Q. How many samples did you see?

143 A. Well, he had a sample, if I remember correctly, of the first shipment, and among them all I should think that there were 4 or 5 or 6 samples.

Q. You think you saw six samples?

A. I should think so; I could not swear positively.

Q. What were they in?

A. Tumblers I think; glass tumblers.

Q. Was there any water in those samples?

A. According to my best recollection there was.

Q. How much?

A. Oh, well, a very little amount in the bottom of the tumbler.

Q. Do you mean to be understood distinctly as claiming that you understood that those samples related to the lard that had been shipped in February and not to the lard that was on board the Auguste Andre, which

had been received on board between the 16th of March and the 8th of April?

A. I am very sure of it.

144 HENRY W. O. EDYE called on behalf of plaintiff and sworn:

Q. Mr. Edye, are you the agent of the steamships known as the Antwerp Line?

A. Yes, sir.

Q. Where is your office?

A. At No. 27 South William st.

Q. Were you such agent on the 8th April, 1876?

A. Yes, sir.

Q. Tell me whether bills of lading were issued to Mr. Börs on that day for 135 tierces marked "W."

A. I only know that such a load was shipped on that day, on the 8th of April, 1876, on that vessel.

The COURT. What was the name of the ship?

A. Auguste Andre.

By Mr. TRACY:

Q. Can you tell when the bills of lading were issued for that shipment?

A. I could not give the date.

Q. Have you no memorandum that will show?

A. No, sir.

Q. What have you in your hand?

A. A dock cargo-book, which we receive in our office every day following the days of delivery.

145 Q. Now, does that show when the bills of lading were issued?

A. No, sir; it does not.

Q. You say that you cannot tell when the bills of lading were issued?

A. I cannot positively say now, sir.

By the COURT:

Q. When did the Andre sail?

A. I am not quite positive, but I think a day or two after that.

Q. The 9th or 10th?

A. I think so; yes, sir; but I am not positive; I have not refreshed my memory.

Q. According to the course of business there when are the bills made out?

A. That depends entirely on the shippers; we never make out the bills of lading; they are made out by the shippers and left at our office and signed by the captain or myself when opportunity presents.

By Mr. TRACY:

Q. Then what is done with them?

A. They are delivered over to the shippers.

Q. Before the ship sails?

A. Sometimes before and sometimes afterward.

Q. Have you any record in your office which will show just

146 what bills of lading were delivered, and when?

A. No, sir.

Q. You only know when the ship sails?
A. Yes, sir.
Q. According to the usual course of business does the bill of lading go with the ship?
(Objected to. Objection overruled and exception taken by defendant.)
A. There is one copy ready for the ship's use in order to enable the ship to clear her freight on here arrival in Europe.
Q. That goes with the ship?
A. Yes, sir.
Q. And the ship sailed on the 9th or 10th?
A. To the best of my recollection.
Q. Now, can you tell us to whose account that was shipped? *Q.* It was shipped to his account, was it not? Was it shipped to the men mentioned in the shipper's receipt?

By the COURT:

Q. Could the lard be obtained without the person to whom it was shipped exhibiting the receipt?
147 A. No, sir; I should not part with it.

By Mr. FORSTER:

Q. Not under any circumstances?
A. Not unless compelled to by course of law.
Q. You would not have given it up at all, even if a receipt was surrendered to you?
A. No, sir.
Q. Are these four receipts (handing witness several papers) Exh's 7, 8, 9, and 10, in the handwriting of your office—some one in your employ?
A. They are in the handwriting of the dock clerk at the time.
Q. All the writing on them is of people in your employ?
A. Yes, sir.
Q. Can you tell from anything here what was the last day this vessel for this particular voyage received cargo?
A. Not from this exh'.
Q. Can you from anything here tell what was the last day on which she received cargo?
A. Not from anything in my possession here.
148 Q. Can you state from anything you have here whether she sailed before the 15th of April?
A. I cannot; not from anything here. In mentioning her sailing-day I gave you my impression, and told you I was not certain on the subject.
Q. Isn't it quite probable that she remained here until the 15th?
A. It might have occurred, but I don't think so.
Q. Did she sail on any particular day of the week?
A. I take it we expected to sail on that same Saturday, on the 8th, but possibly we were delayed. Our steamers are not mail steamers. We try to get them off as fast as we can.
Q. My question is whether Saturday, the 15th, was not the day on which she was to sail?
A. It is so long ago that I cannot remember.
Q. You cannot say at all with regard to the date?
A. No, sir.

149 Q. Saturday was the regular sailing day?
A. Yes, sir.
Q. But you cannot tell whether the Saturday on which she was to sail on that voyage was the 8th or 15th, can you?
A. No, sir; I cannot.

LEVI COOK, Jr., witness on behalf of plaintiff, being duly sworn, testified as follows:

Q. Mr. Cook, are you the book-keeper of Mr. Preston, or were you at any time?
A. Yes, sir.
Q. When; in what year?
A. April, 1876.

Plaintiff rests.
Counsel for defendant moves to direct a verdict for the defendant.
The COURT. No, I cannot entertain that.

150 Mr. Forster opened for the defendant, and called as his first witness AUGUSTE WALTHER, who, being duly sworn, testified as follows:

Q. Mr. Walther, what is your business?
A. Broker in lard and provisions.
Q. And where is your place of business?
A. No. 80 Beaver st.
Q. How long have you been in that business?
A. About 20 years.
Q. And how long have you been dealing in lard?
A. About twenty-seven years.
Q. In the city of New York all the time?
A. Yes, sir.
Q. Now, Mr. Walther, when did you first hear about Mr. Preston in connection with this matter, and in what connection?
(Objected to as immaterial; objection sustained; exception taken by defendant.)
Mr. FORSTER. I desire to prove, if your honor please, the interwiew with Mr. Fisher, and the interview with Mr. Preston at Mr. Preston's office through Mr. Fisher's introduction, to which I have referred in my
151 opening, and that Mr. Preston stated to this witness that he had a proposition to go into the business of refining lard with some parties, and asked his advice on that subject.
(Evidence to the offer excluded; exception taken by defendant.)
Q. Now, in the month of April, 1876, after this lard had been put on board the Auguste Andre, were you called upon, as an expert, to test it?
(Gen. Tracy asks that the question be confined to the 135 tierces in question, and the court so rules.)
A. Yes, sir.
Q. Now state the result of that examination.
Gen. TRACY. Let him state what he did, first.
A. I went into Mr. Börs' office and saw samples of that lard; and I melted up some of that lard in a glass—melted it on the stove, and then let it cool off, and showed Mr. Börs that it contained water.

152 Q. Well, now, from your experience as an expert in lard, and the examination you made of it, how much water should you judge that lard contained?

By the COURT:

Q. From your experience, were you able to tell what proportion of water there was in it?

A. About; yes, sir; it cannot be stated exactly except by chemical analysis; by my own examination I thought it contained from 10 to 15 or 20 per cent. water.

By Mr. FORSTER:

Q. Who took the samples that you examined? State whether you know who took the samples.

A. Mr. Wilson brought them into the office.

By the COURT:

Q. Do you know that of your own knowledge?

A. I could not say positively.

Q. You are stating this upon information?

A. Yes, sir; I came into the office, and Mr. Börs told me so.

By Mr. FORSTER:

153 Q. Did you see Mr. Wilson with regard to these samples?

A. No, sir.

Q. Then when you stated that Mr. Wilson brought you one of the samples you were mistaken?

A. Yes, sir; I was mistaken.

Q. Well, now, what do you know about how these samples that you examined were taken?

A. I think that they were taken.

Q. You stated, if I remember correctly, that they were brought in by Mr. Goullard, the lard sampler; did you have any conversation with Mr. Wilson at any time before he begun the introduction of this lard, as to what was necessary if he should introduce his lard?

A. Yes, sir.

Q. State when, where, and what that conversation was.

(Objected to as irrelevant and immaterial; objection sustained; exception taken by defendant.)

154 Q. Now, can you state what the value of lard would be on the 11th of April, 1876, in the city of New York, that had from 10 to 15 or 20 per cent. water in it; such lard as you found this to be?

(Question objected to on the ground that there is no such proof in the case; objection sustained; exception taken by defendant.)

By the COURT:

Q. Give your judgment on that lard as it was?

A. I could not say; there is no such lard in the market, offered for sale.

By Mr. FORSTER:

Q. What, at that time was pure refined lard worth; pure, not adulterated with any water?

A. At what time?

Q. Say the 11th of April, from the 8th or 10th of April, 1876?

A. Fourteen cents.

Q. Now, what difference would it make, in your judgment, in the
155 value of pure refined lard, if it is adulterated with water, as you found these samples to be?

A. I could not say; it could not be sold in the regular trade; we would regard it as a swindle.

Q. It could be refined?

A. The water could be extracted.

Q. And then the lard, when refined again, would be worth whatever the quality might be at that time?

A. Yes, sir.

Q. Can you state what would be the expense and loss in that process?

A. I have practical experience in that business.

By the COURT:

Q. About what would it cost to refine that lard?

Mr. FORSTER. Count the loss of weight by water and all other expenses.

A. A difference of about 25 per cent., I should think.

Q. And if the lard was adulterated with a greater percentage of water than you have given, then it would be still greater?

A. Yes, sir.

Cross-examined by Gen. TRACY:

156 Q. Mr. Walther, you are not a refiner of lard, are you?

A. Not a practical refiner, but I understand it.

Q. Refining lard is supposed to take the water out of it—to remove the water—is it not?

A. No, sir.

Q. And whiten it?

A. Only to whiten it.

Q. Does it not remove the water also?

A. You can remove it.

Q. You say you could?

A. Yes, sir; and you could add to it.

Q. What does it cost you a pound to refine lard; do you know?

A. Yes, sir.

Q. How much?

A. That depends on the process, whether you make it better or purer; from a quarter to $\frac{3}{8}$ of a cent a pound.

Q. And the value of the lard would be diminished according to the amount of water in it and the percentage from $\frac{1}{4}$ to $\frac{3}{8}$ of a cent a pound?

A. Yes, sir.

157 Q. So that if the lard contained 10 per cent. more water than it ought to the difference would be $10\frac{3}{8}$ per cent. in the value, wouldn't it?

A. The difference in water would be one cent, but the difference would be still further; that is, a heavier expense than if you refined the lard in the regular way.

Q. But you would refine it in the regular way, would you not?

A. I would have nothing whatever to do with any lard that had water in it.

Q. I am trying to find out what it costs to get the water out of it.

A. That process is seldom gone through with here; it is not gone through at all.

Q. I don't care for that; you could remove the water by refining it?

A. Yes, sir.

Q. And it would cost from ¼ to ⅜ per cent. to refine it?

A. Yes, sir.

Q. Then, if it has ten per cent. water, there ought to be—would it not be—10⅜ per cent.?

A. No, sir; ten per cent. and ⅜ of a cent per pound.

Q. Then, it would be ⅜ of one cent?

A. Yes, sir.

158 Q. Now, where did you get these samples that you examined?

A. In Mr. Börs's office.

Q. How many samples did you have, do you know?

A. There were several samples—two, three, or four.

Q. How long they had been in that office you do not know, of your own knowledge?

A. I do not know.

Q. And where they came from you do not know, of your own knowledge?

A. No, sir.

Redirect by Mr. FORSTER:

Q. Who was present in Mr. Börs' office at the time you saw the samples?

A. Mr. Maziere, Mr. Börs, and another young man.

Q. General Tracy, in a question of his, made some such remark as "more water than lard;" ought lard to have any water in it?

A. No, sir.

Q. What is the process of refining lard to accomplish; was it to take out the water in order to make it pure refined lard?

A. The chief object is to make it white for these continental markets in Europe by adding stearine.

159 Q. The more stearine there is in lard the more it is refined?

A. You want a certain quantity of stearine, a certain percentage.

Q. The more there is in it the more the lard is refined?

A. I would not say that; we want a certain percentage.

Q. How much?

A. Sometimes more and sometimes less.

Q. In summer, when the weather is warm, you require a little more, and in winter, when the weather is cold, a little less stearine is required?

A. Yes, sir.

Recross by Gen. TRACY:

Q. Do you pretend to say that all refined lard has not a greater or less percentage of water in it?

A. Repeat the question, if you please.

Q. Has not all refined lard a greater or less percentage of water in it?

A. No, sir; the bulk of it has no water at all; but for our grocery trade here in this city, and some South American and East India places,

160 people offer lard adulterated with water on purpose.

Q. Do you pretend to say that, as a rule, refined lard has no water in it whatever?

A. The lard we take for Europe has no water; none at all; no, sir.
Q. How do you know?
A. By long practice.
Q. You are not a chemist?
A. No, sir.
Q. Can anything but a chemical analysis detect whether there is more or less water in lard, or not?
A. We can detect it; there is a little quantity of water perhaps in Western lard—½ or 1 per cent.—that nobody but a chemist could bring to light; but it is very small.
Q. Don't you know that melted lard will retain more or less water in it?
A. No, sir.
Q. That it must have water to a considerable amount to have it settle and separate?
A. No, sir.

161 FREDERICK P. FORSTER, witness on behalf of defendant, being duly sworn, testified as follows:

Q. What is your occupation?
A. Attorney and counsellor at law.
Q. Are you one of the defendant's attorneys in this case?
A. I am.
Q. Who prepared this case for trial at this term?
(Objected to as immaterial and irrelevant.)
The COURT. You may admit the fact conceded that Mr. Börs is sick and unable to be here, and that you were not aware of the fact that he was sick until after you had entered upon the trial.
Mr. FORSTER. I offer to prove that the witness prepared this case for trial in my neccessary absence; that I did not return to the city until 10 o'clock Monday morning; that we did not learn of Mr. Börs's illness until after the court had adjourned on Monday, when the witness went to his office, found he had not been down that day, then went
162 to his house and found he was sick abed and unable to talk with him about the case. He was there again yesterday morning and last night, and found him in the same condition.
The COURT. Ruled out; unless defendant can show something different from what has been stated in the opening of his case, it will make no difference whether he is here or not
Mr. FORSTER. Will your honor allow me to take an exception?
The COURT. No, sir; it is not a matter of exception, nor a ruling that you can take any advantage of. It is a matter of discretion, and I should allow you to withdraw a juror, if I thought you would be prejudiced by the absence of the defendant, notwithstanding your laches in going to trial before ascertaining whether you were prepared.

163 NICHOLAS BRANDT, witness on behalf of defendant, being duly sworn, testified as follows:

Q. What is your business?
A. I am a merchant.
Q. And where is your place of business?
A. 27 William st.
Q. Have you had any experience in lard?

A. Yes, sir.
Q. What experience have you had in lard and for what period of time?
A. Four years as a merchant.
Q. Were you in Europe at any time in 1876?
A. Yes, sir.
Q. When did you go there?
A. In February.
Q. When did you return?
A. In June.
Q. For what purpose did you go there?
A. To investigate frauds on Wilcox & Co.'s lard.
Q. Did you go to Antwerp?
A. Yes, sir.
Q. Did you go to the house of the Brothers Nottlebohm there?
A. Yes, sir.
Q. Did you see any samples of the lard of Wilson & Son there in Antwerp?

164 By the COURT:

Q. Have you any personal knowledge that you saw any samples of lard which was delivered by Wilcox & Son to the defendant?
A. Yes, sir; pers'.
Q. Personal knowledge?
A. Yes, sir.
Q. How is it derived?
A. I saw the lard.
Q. Did you see the lard delivered?
A. No, sir.
Q. How do you know that the lard you saw was a sample of that which was delivered by Wilcox & Son to the defendant?
A. The lard was offered to me all over Europe, in every market in Europe, and afterwards I saw samples.
(Objected to; objection sustained; exception taken by defendant.)

By Mr. FORSTER:

Q. You saw the samples in Antwerp?
A. Yes, sir.
Q. Did you see the samples anywhere else?
A. No, sir.
Q. The only place where you saw the samples was at Antwerp?
A. Yes, sir.

165 Q. Did you examine and test those samples that you saw in Antwerp?
(Objected to unless the defendant shows that the samples he saw were taken from those shipped by Wilcox & Son for the defendant. Objection sustained.)
Q. Where did you see those samples?
A. In a broker's office.
Q. What was the condition of the lard you so examined?
(Objected to as immaterial and irrelevant, there being no proof that it was Wilson's lard; objection sustained; exception taken by defendant.)
Q. You have stated that you saw samples of lard at Wilson & Son'?
A. Yes, sir.

Q. How do you know that was Wilson & Son's lard?
A. It was marked on the samples.
Q. It was handed in that way, was it?
The COURT. No, he says it was marked on the samples.
Q. What were the samples in?
A. In a big jar taken from several tierces.

By the COURT:

166 Q. That is, you suppose they were taken from several tierces?
A. Yes, sir.
Q. At whose broker's office was it that you saw those samples?
A. Nottlebohm Brothers.
Q. How many samples did you see there?
A. They were all in one parcel as taken from different tierces.
Q. What sort of a parcel?
A. In a jar, I believe.
Q. What sized jar?
A. A couple of pounds, I should think.
Q. Did you take any samples away to examine?
A. Yes, sir.
Q. What quantity?
(Objected to as immaterial and irrelevant, and no evidence that this lard in the jar was taken from the lard manufactured by Wilson & Sons in New York; objected sustained; exception taken by defendant.)
Q. What was the name of the broker; where was his place of business?
A. I don't exactly remember.
Q. Do you remember the place where this broker's office was?
167 A. No, sir; I am not familiar with Antwerp enough.
Q. Not familiar with the localities there?
A. No, sir.
Q. Can you say whether or not his name was P. Cortecels Van Anden?
A. That sounds like it.
(Stipulation offered in evidence and marked "Defendant's Exh. No. 13." (Insert it.)
Gen. Tracy objects to the affidavit, which was not taken before a consulate under the stipulation.
Van Anden's deposition read in evidence. (Insert it.)
The court strikes out the 6th interrogatory, to which counsel for the defendant excepts.
7th interrogatory excluded; defendant excepts.
(On the 9th interrogatory Gen. Tracy objects to any answer except such as is limited to the consignment in question, and as not competent on the measure of damages.
Objection sustained; exception taken by defendant.
168 10th interrogatory objected to as wholly immaterial and irrelevant; objection sustained; exception taken by defendant.
Deposition marked "Defendant's Exh. No. 14.")
Q. Mr. Brandt, you have heard these two depositions that have been read?
A. Yes, sir.
Q. Do you know, in speaking of sales at 29 and 30 florins to Mr. Börs

of Wilcox's lard and 35¾ and 36 florins or guilders, what quantity of lard was sold at that price? Do you know how lard is sold in Antwerp—what quantity is sold, at so many guilders?

A. The price in guilders—at that price you have values for fifty kilograms.

Q. How many pounds is that; 112½ pounds, isn't it?

A. About that.

Q. How many pounds in a kilogram?

A. Little over two pounds.

Q. It is a fraction over two pounds?

A. Yes, sir.

Q. Lard is quoted and sold in Antwerp by the fifty kilograms, is it?

A. Yes, sir.

Q. Or killoes, as it is called for short?

A. Yes, sir.

169 By Gen. TRACY:

Q. Is that 56 hundred pounds, or what is it?

By Mr. FORSTER:

Q. Every 112 pounds of Wilcox's lard is 36 guilders?

A. It is that sum for every 112½ pounds, I believe.

By the COURT:

Q. Is a guilder forty cents?

A. About that.

By Mr. FORSTER:

Q. I now repeat the question: Will you state the condition of those samples of this lard which you saw at this broker's office?

(Objected to, there being no proof that these samples came from Wilson's lard; objection sustained; exception taken by the defendant.)

Q. Now, Mr. Brandt, will you please to state what effect the adulteration has on lard in Antwerp as to its market value or as to its being saleable?

(Objected to as immaterial and irrelevant; objection sustained; exception taken by defendant.)

170 Q. What frauds in lard were you sent to Europe to investigate, as you have stated—the adulteration of lard?

A. Yes, sir.

Q. What effect on the value of lard for shipment to Antwerp would its adulteration with water have had, on or about the 8th of April, 1876, on its value in New York City?

(Objected to; objection sustained; exception taken by defendant.)

Q. Now, how common was the adulteration of lard with water at that time, in 1876?

(Objected to as inadmissible; objection sustained; exception taken by defendant.)

Q. Well, now, what can you say, from your experience in the lard business, is the effect on the market value in the city of New York, as to whether lard is pure and refined lard, or whether it is adulterated with 20 per cent. water?

A. 20 per cent. water would make 25 per cent. less price.

Q. Repeated.

171 The COURT. Consider the question as repeated and excluded as to the samples which he saw at the office of P. Corticels Van Anden.

(Defendant excepts.)

Cross-examination by Gen. TRACY:

Q. Mr. Brandt, will you tell us why 20 per cent. adulteration of lard with water does not decrease its value 20 per cent. instead of 25?

A. Because 20 per cent. added is 25 per cent off.

Q. You think 20 per cent. added is 25 per cent. off?

A. Certainly it is.

Q. That is the reason?

A. Yes, sir.

Redirect by Mr. FORSTER:

Q. Will you please explain what you mean by saying that 20 per cent. water depreciates the value only 25 per cent. on the basis you have given; how do you get at that?

A. In New York it is considered a difference in price.

Q. What is it that exists in New York which makes the adulteration of lard with water simply a difference in price?

A. Because it is marketable.

By the COURT:

172 Q. Well, does it cost something to extract water from the lard?

A. Yes, sir.

Q. The cost of extracting is to be added to the difference in percentage?

A. Yes, sir; it costs from $\frac{1}{2}$ to $\frac{3}{4}$ of a cent a pound to extract the water.

Q. And the balance is simply the amount of water there is there in place of the lard?

A. Yes, sir.

By Gen. TRACY:

Q. Are you a refiner?

A. No, sir.

Q. Don't you know that it costs only $\frac{1}{4}$ of a cent a pound to refine lard; say from $\frac{1}{4}$ to $\frac{3}{8}$ of a cent a pound?

A. The difference between Western lard——

Q. No, no; answer the question; I ask you if you don't know that the cost of refining lard in New York is from $\frac{1}{4}$ to $\frac{3}{8}$ of a cent a pound?

A. I know it is more.

Q. You know it is more?

A. Yes, sir.

Q. You are not a refiner?

A. No, sir.

Q. And never refined?

A. No, sir.

By Mr. FORSTER:

Q. You commenced to state something with regard to the difference between Western lard, when the counsel interrupted you; please ex-

173 plain what you were about to state.

A. Between Western lard and Wilcox's lard.

Q. What is the difference?

A. We generally take from ⅜ to ½ a cent a pound as the difference in value.

Q. As the difference in value between Western lard and Wilcox's?

A. Yes, sir; that is what the house themselves calculate the difference in the price when they give the price for their own lard.

Q. Is refining Western lard the taking of the water out; is that what the process of refining takes out of Western lard?

A. They would not buy Western lard with water in it.

Q. Then it is not the taking of water out of Western lard only?

A. Cleaning it.

Q. The cost is for taking something else out than water?

A. Uncleanness; yes, sir.

Q. You have stated that you know it costs more than the amount stated by Gen. Tracy, but that you are not a refiner, and never refined; how do you know?

174 A. By the difference in price; we buy Western lard, and refine Wilcox's lard.

Q. How extensive have been your transactions in lard?

A. Thousands of tierces.

By Gen. TRACY:

Q. Then you mean to say that Wilcox will buy Western lard and refine it, and sell it to you for from ⅜ to ½ a cent. more than he pays for Western lard?

A. Yes, sir.

Q. Included in that is the cost of the transaction or the profits of the transaction?

A. Yes, sir.

By a JUROR:

Q. What would be the cost of taking lard at Jersey City dock and refining it if it had 20 per cent. water in it?

A. I don't know.

By the COURT:

Q. I suppose you would have to add the cost of refining and cartage?

A. Yes, sir.

By Mr. FORSTER:

Q. Do you know what the cost of handling lard is, or carting it?

A. Yes, sir; I have charged 20 cts. a tierce to put the lard on board.

Q. And how much a tierce is the cartage between Jersey City and

175 New York?

A. 20 cents a tierce wherever it is; that is always the charge.

Q. Do you know who put the lard on board; it is not put on board by the cartmen that deliver it on the dock, is it?

A. The shipper brings it to the dock and the shipper takes it and puts it on board.

EDWARD L. COHN, witness on the part of the defendant, being duly sworn, testified as follows:

Q. What's your business?

A. Telegraph operator.
Q. And where?
A. With the Direct United States Cable Co., No. 16 Broad st.
Q. (Handing paper to witness.) Look at this paper, and see if you can identify it.
A. I can identify it with the exception of the blue writing on it; that is none of ours.
Q. The rest is your writing?
A. Yes, sir.
Q. That is an original telegram from your company?
A. Yes, sir; that is an original.
Q. Where is this from?
A. Anvers.
Q. That is Antwerp, as we call it?
A. Yes, sir.
176 Q. Antwerp and Anvers are the same place?
A. Yes, sir.
Q. On what date was that despatch received in New York?
A. On the 8th day of April, 1876, according to that.
Q. Does it state on the despatch when it was received here?
A. Yes, sir.
Q. And that statement of when it was received here was written in your office, was it?
A. Yes, sir.
Q. The blue writing is no part of the despatch?
A. No, sir.
(Gen. Tracy examines the telegram and objects to it. Excluded so far as it relates to the lard shipped on or before the 8th of April. Marked "Defendant's Exh. No. 15.")
Q. (Handing witness another paper.) Is that another original cable message?
A. Yes, sir.
Q. That was also received from Antwerp?
A. Yes, sir.
Q. When was that received?
A. The 3rd of May.
Q. Of what year?
A. 1876.

Cross-examined by Gen. TRACY:

Q. Were these telegrams originals from your office?
A. Yes, sir.
177 Q. How are you able to identify them as originals?
A. In two ways; first, by the signature, and second, by the writing. We have the same men in the office to-day that we had at that time.
Q. Did you write it?
A. No, sir.
Q. Did you have anything to do with it?
A. No, sir.
Q. They are not office copies?
A. No, sir; they are originals.

Q. Whether you have produced all the telegrams received in regard to this lard or not, you do not know?

A. No, sir.

Redirect by Mr. FORSTER:

Q. Do you know the person in whose handwriting these telegrams are?

A. Yes, sir.

Q. You know the operator whose duty it is to write these telegrams?

A. Yes, sir; one of them; the other is in our office in Boston at the present time.

(Both telegrams offered in evidence and excluded;) defendant excepts. (Inserts them.)

178 JOHN V. VAN ARSDALE, witness on the part of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. FORSTER:

Q. What is your business?

A. Clerk in the New York custom-house.

Q. And in what department of the custom-house?

A. In the 7th division in charge of records.

Q. The steamer Auguste Andre sailed from this port in the month of April. 1876; on what day did she clear at the custom-house?

A. The 15th of April.

No cross-examination.

GEORGE R. HENDERSON, witness on behalf of the defendant, being duly sworn, testified as follows:

Q. What is your business?

A. Book-keeper for Gorman & Co.

Q. What is the business with which you are connected?

A. Provisions for export.

Q. Do you have anything to do with lard?

A. Yes, sir.

Q. With refining lard?

A. No, sir.

Q. What is your acquaintance with lard?

179 A. We merely render lard and sell it to refiners.

Q. Well, you are not the man I want. Do you know anything about refining lard?

By the COURT:

Q. Do you know the process of refining lard in April, 1876?

A. Yes, sir.

By Mr. FORSTER:

Q. What do you know about it?

A. Steam lard, 14 cents; and Wilcox's lard, about 14 $\frac{50}{100}$.

Q. Do you know anything about the adulteration of lard with water? Where lard is 20 per cent. water adulteration what effect would that have upon its value?

A. I have no experience in water.

No cross-examination.

CHARLES M. STILLWELL, witness on behalf of defendant, being duly sworn, testified as follows:

Q. Mr. Stillwell, what is your occupation?
A. Analytical and consulting chemist.
Q. How long have you been such?
A. Since the fall of 1868; I have practised in this city ever since.
180 Q. What was your concern in April, 1876?
A. The firm-name was Walz & Stillwell.
Q. Who was your partner?
A. Dr. Isadore Walz.
Q. And how long had you known him?
A. I had known him since the spring of 1869.
Q. How long had he been an analytical and consulting chemist, to your knowledge?
A. He was such at that time and I know not for how long before.
Q. He was that when you became acquainted with him?
A. Yes, sir.
Q. Where is he now?
A. Dead.
Q. When did he die?
A. The 25th of October, 1877.
Q. Did you receive from Christian Börs, on the 19th of April, 1876, these samples of lard?

By the COURT:

Q. Do you know, of your own knowledge, that any lard was received from the defendant at the time spoken of?
A. It was not delivered to me personally.
Q. Did you see it delivered at all?

By Mr. FORSTER:

Q. Did you see samples at the office?
181 A. Yes, sir.

By the COURT:

Q. Did you see the samples delivered?
A. No, sir.
Q. Do you know, of your own knowledge, who delivered them?
A. No, sir.

By Mr. FORSTER:

Q. Did you see them in your office?
A. I did.
Q. Have you a record of the result of that examination?
A. I have.
Q. Let us have it. (Witness produces record.) You have it before you, have you?
A. Yes; our laboratory book at that time, with regard to these analyses of lard.
Q. In whose handwriting are the entries there?
A. Dr. Walz's.
Q. Is everything there in his handwriting?
A. Yes, sir; every figure and letter.

Q. Did he keep that book at that time?
A. Not wholly; for instance the next entry is in my handwriting, and the next one is his, and the next one mine, and so on.

182 By the COURT:

Q. The entries made there were made either by him or you in the ordinary course of business?
A. Yes, sir.
(Entry offered in evidence.)

By Gen. TRACY:

Q. You had no knowledge, I assume from the course of the examination, of this analysis yourself?
A. No personal knowledge.
Q. All you know about it is that you saw samples of lard in the office, and you find in your book, in your then partner's handwriting, an entry relating to some sampling, isn't it?
A. Yes, sir.
Q. You had no knowledge where those samples came from; no personal knowledge?
A. No personal knowledge as to their delivery.

By Mr. FORSTER:

Q. You saw them in your office?
A. In the office in course of analysis?

By Gen. TRACY:

Q. You didn't even see them in the bottles, then, or packages in which they came?
A. Yes, sir; I did.

183 Q. How could they be under a course of analysis and still in the original packages in which they were brought there?
Because we do not always use the whole of the sample received.
Q. Now, your business was analyzing samples for everybody, I suppose?
A. Yes, sir.
Q. Have you any personal knowledge that the entry pointed out in this book, as in the handwriting of your then partner, relates to any particular samples that you saw in your office, or has reference to them?
(Objected to; objection overruled; exception taken by defendant.)
A. I have.
Q. What is there in that entry that identifies the samples that you saw at the office?
A. The name of the gentleman from whom they were received and the results of the analysis.
Q. How would the result of the analysis serve to identify the particular package of lard analyzed?

184 A. Because I saw the samples while Dr. Walz was analyzing them, overlooking the process; we talked about them together, and I noticed that the results obtained and the entries on the book agreed with the analysis.
Q. Then you know all about it?
A. Personally, I did none of the work.

Q. You say that you looked over and saw this analysis going on?
A. Yes, sir.
Q. I asked you if you took any part in this analysis, and I understood you to state that you did not.
A. I did not, personally.
Q. Well, did you take such notice of it that you had personal knowledge, aside from what your partner told you, of the result reached?
A. In one sense I did.
Q. And in one sense you did not?
A. I did not do the work personally, so that I made none of the calculations and none of the weighing necessary, but I saw the analysis in the course of performance and noticed certain things about it.

185 Q. Did you notice enough so that this entry enables you to say that this entry relates to the same package which you saw being analyzed?

A. I did.
(Mr. Forster reads from the entry in question: "April 19th, 1876. C. Börs, to lard No. 112. 1 H. O. 9 per cent.; S. P. 40° C.")
The COURT. Let the witness interpret it.
A. "April 19. C. Börz, No. 112." That is the number of the analysis,
Q. That is your number?
A. Yes, sir. "Lard No. 1."
Q. That is the number of the sample?
A. Yes, sir. "Water, 9 per cent.; S. P., meaning solidifying point, 40° centigrade," thermometer.
Q. How does that correspond with Fahrenheit's thermometer—the one in ordinary use; the centigrade thermometer is the one where the freezing point is at zero, and the boiling point at 100°?
A. Yes, sir. The centigrade thermometer is the one used chiefly in scientific investigations. The Fahrenheit thermometer is an English thermometer.

186 Q. To convert centigrade into Fahrenheit what do you do? You divide by five, multiply by nine, and add three to that?

A. Yes, sir. That brings it to 104 Fahrenheit.

By the COURT:

Q. What does that signify?
A. A temperature at which fatty acids solidify.
Q. Is that favorable or unfavorable?
A. At this point, favorable.

By Gen. TRACY:

Q. To the lard?
A. Yes, sir; because it proves something. "No. 113."

By Mr. FORSTER:

Q. That is your number again?
A. Yes, sir. "Lard, No. 2."
Q. That is the sample number?
A. Yes, sir. "Water, $5\frac{30}{100}$ per cent.; S. P., 40° C. (centigrade)." Our number 114; lard, No. 3; water, 8 per cent.; S. P., 40° C. Report, April 20." (Date of report.)

Q. And is that the report referred to or duplicate of it (handing witness paper)?

A. That is a duplicate made by me from a copy of the original report.

(Marked "Defendant's Exh. G," for identification.)

187 It is agreed that the steamer Auguste Andre sailed at 3 o'clock on the afternoon of Saturday, April 15th, 1876, from New York; that the steamer C. P. Funch sailed at 35 minutes past 1 o'clock on the 13th of March, 1876, and that the Auguste André, on her first voyage, sailed at 55 minutes past 8 o'clock on the 19th of February, 1876.

MARTIN ROUSE, witness on behalf of defendant, being duly sworn, testified as follows:

Direct examination by Mr. FORSTER:

Q. Do you know Mr. Preston, the plaintiff in this action?

A. I have seen the gentleman; yes, sir.

Q. How long have you known him?

A. That I could not say.

Mr. PRESTON. Ten or fifteen years.

Q. Is that correct?

A. I suppose so.

Q. You have sampled lard for him during that time?

A. Yes, sir.

Q. What is your firm?

A. Goullard, Rouse & Bostwick.

Q. Did you, on the 15th of April, 1876, take any samples from
188 lard on the steamer Auguste André, by direction of Christian Börs?

A. No, sir; not personally.

Q. Who did?

A. Our man that we employed.

Q. You have samples that were taken, have you not?

A. Yes, sir.

By the COURT:

Q. Who sampled them?

A. The man who took those samples is sick now, and not in our employ.

By Gen. TRACY:

Q. Is it Billy?

A. Yes, sir, Billy McGovern. He is sick now, and has been for three years.

By Mr. FORSTER:

Q. In whose handwriting is this memorandum you have brought here?

A. Our book-keeper in the office; a memorandum from the books.

Q. That you took of the samples from the 135 tierces of lard on the 15th of April, 1876?

A. We do not do all our work; we have to employ men to do it.

Q. Where is this man?

A. The man is in the hospital in Brooklyn.

189. Q. Where is your original book of entry?

A. In our office, No. 36 Whitehall st.

Q. In whose handwriting is the entry of that sampling of these 135 tierces of lard?

Q. Now, where is the man who did the sampling?
A. In the hospital.
Q. What hospital?
A. The Old Man's Home, in Brooklyn.
Q. Where is the person in whose handwriting the entry with regard to that sampling is?
A. His name was Michaels. He has been dead two years. He was our book-keeper.
Q. You saw that entry this morning, did you?
A. I did not.
Q. Who gave the orders by which William did what he did with respect to these samples?
A. I sent him over there.
Q. What order did you give him?
(Objected to as incompetent; objection sustained; exception taken by defendant.)
Q. You sent him over to take these samples for Mr. Börs, did you not?
189a (Objected to as incompetent; objection sustained; exception taken by defendant.)
Q. Were you directed by Mr. Börs to take these samples?
(Objected to as incompetent; objection sustained; exception taken by by defendant.)
Q. Were you directed by the defendant to take samples on the Auguste Andre?
A. They send the memorandum and we go to the steamer with the mark or brand; our man brings the samples over to the office; then I take it myself to the shipper's office and turn them in the samples, and go on about my business.

By Mr. FORSTER:

Q. Now, the memorandum you received from Christian Börs at that time was in writing, was it?
A. I could not say, sir; I say we generally get our memorandum in that way. In this case I am not positive.
Q. What is your best recollection?
189b A. I suppose we must have had the marks and numbers of the packages, else we could not have got the samples on the dock.
Q. Now, when did you send your man over to get those samples?
A. I suppose, as soon as we found they were on the pier.
Q. What day was it? Look at your memorandum and see.
(Objected to on the ground that the witness had not made the memorandum in question.)
Q. Who made that memorandum?
A. My son made it in the office.
Q. What is his name?
A. John Rouse; he is our book-keeper.
Q. This memorandum is in the handwriting of your son?
A. Yes, sir.

Q. Was it made in your presence?
A. Yes, sir.

By the COURT:

This is a copy from the book, is it not?
A. Yes, sir.
The COURT. Then it is not so competent.

Q. Will looking at this memorandum, made as it was, in your
190 presence, by your son, refresh your recollection so as to enable you to say on what day it was that you received directions from Mr. Börs or sent Billy to take the samples from the 135 tierces of lard in question?

A. Well, I am not positive about the day; I can only go by the memorandum.

By Gen. TRACY:

Q. You have no recollection, aside from the memorandum?
A. My only recollection is bringing samples to the office and sending them in.

By Mr. FORSTER:

Q. Will not looking at this memorandum refresh your memory as to when it was done?
A. Done at the date on that paper.
Q. Look at that paper, then, and state on what day it was done.

By the COURT.

Q. Does it refresh your recollection; have you any recollection now?

A. (After looking at the paper.) The recollection I have is of
191 sending the man over and he brought the samples.

Q. As to the time, have you any recollection now?
A. The hour or the day?
Q. The day.
A. The only date I have to go by is the book; I know the work was done at that time.
Q. Now, what day was it that he brought them from the 135 tierces?
A. That is on the 15th of April.
Q. Of what year?
A. 1876.
Q. Well, now, when Billy had taken these sample', what did he do with them?
A. Brought them to the office.
Q. Did you see them?
A. Yes, sir.
Q. And what was done with them then?
A. They were brought to Christian Börs.
Q. How many were there of them?
A. That I could not say, how many.
Q. Were they correct samples of lard?
(Objected to as incompetent; objection sustained; exception taken by defendant.)

Q. Did you take any samples for Christian Börs at any other
192 time of any other lard?

A. I could not say; there might have been shipping lard all the time.

Q. I mean, except the 15th. Look at that memorandum.

A. There is a lot here on the 19th.

Q. When was that sampled?

The COURT. I must exclude all evidence except that relating to the 135 tierces.

Mr. FOASTER. My effort is to show when and what samples they took for Mr. Börs of the 394 tiers of lard, represented by the first three ship's receipts of the Auguste Andre shipment, not limiting it to the 135 tierces.

(Question excluded; exceptions taken by defendant.)

After recess Martin Rouse continued as follows:

By Mr. FORSTER:

193 Q. Do you remember to whom you delivered those samples from the 135 tierces that you took round to Mr. Börs's office on the 15th of April, at that office? *Q.* The samples of which you have testified, to whom did you deliver them there?

A. A gentleman here in court. (Mr. Mazere was requested to stand up.)

Q. Is that the gentleman?

A. Yes, sir.

Q. Now, what were those samples in?

A. In a blue paper-box.

Q. And how much lard would each box hold?

A. Well, about one pound.

Q. Well, now, in taking samples from the line of 135 tierces, how did he take the samples; each sample from one tierce, or how?

A. We take the samples as we go along and fill the box, and whatever amount will fill the box, we stop there; say 15 or 20 tierces.

Q. From 15 or 20 tierces to fill a box?

A. Yes, sir.

By the COURT:

Q. They try to take an accurate sample, I suppose?

A. Yes, sir.

194 By Mr. FORSTER:

Q. Now as to cartage; do you know what the expense per tierce cartage between New York and Jersey City?

A. I suppose 20 or 25 cents.

Q. And what is the cartage when merely in New York City?

A. You can rate it at from ten cents up, according to the distance you have to go.

Q. Up to how much?

A. Up to 33rd st., I suppose, would be twenty cents.

Q. The ferryage to Jersey City; who pays that?

A. I don't know.

Q. That goes in to make up the cartage to twenty-five cents, does it not?

A. I suppose so.

Q. What does that ferryage amount to on each load?
A. It amounts to about seventy cents there and back.
Q. How long have you had to do with lard?
A. Since 1851.
Q. In the city of New York during this whole period, engaged in that business?
195 A. Yes, sir; except when I go west on a trip and look after same.
Q. Now, in your whole experience, did you ever know any lard that had been put on board of a vessel for shipment to the other side to be taken off?
A. That I could not say.
Q. Do you know what the expense would be of that?
A. No, sir.
Q. You never knew that to be done?
A. It has been done, I suppose.
Q. You never knew it to be done in your experience?
A. I could not say.
Q. Now, did the concern weigh the 104 tierces that were shipped in this Auguste Andre on the 15th of March, 150 tierces on the 23rd of March, and 140 tierces on the 29th of March?
(Gen. Tracy objects to all but the 135 tierces in question.)
Mr. FORSTER. I claim as the construction of this contract of February 8th, that the defendant agreed to advance on lard and not on water. I
196 claim that if the advance actually made by the defendant on the lard that was shipped by the Auguste Andre, not counting the water that was in it, covered not merely the lard which went on board the vessel on the 15th, 23rd, and 29th, but also the principal amount or the whole that went on board on the 8th of April, that then the plaintiff's demand that was stated, without a tender of the advance which had been made by the defendant on the lard on board that vessel, and I propose, therefore, to prove the weight, with a view to getting at what amount of lard, actual lard and not water, was on board that vessel on these various dates.
The COURT. Well, I will exclude the evidence.
(Exception taken by the defendant.)
Mr. FORSTER. Now, if your honor please, I will offer the dispatches received, in memorandum.
197 (Marked Exh's, F & G, for identification in evidence.)
(Objected to; excluded; exception taken by defendants.) (Insert them.)

HENRY DE MAZIERE, witness on behalf of the defendant, sworn, and testified as follows:

Q. What is your business?
A. Merchant.
Q. Where is your place of business?
A. No. 18 Exchange Place.
Q. What is your firm-name?
A. H. De Maziere.
Q. Prior to the present year in what firm were you?
A. Partner in the firm of Christian Börs & Co.

Q. And prior to that what relation did you sustain to him?
A. Clerk, and interested in the firm.
Q. You are Mr. Börs's successor in business now?
A. Yes, sir.
Q. He does no business except being Swedish and Norwegian consul?
A. Yes, sir.
Q. Where does Mr. Börs reside?
A. No. 44 E. 57th st.
Q. In the city of New York?
A. Yes, sir.

Q. And the consulate is in the same building as your office, is it?
198 A. Yes, sir.

Q. You know Mr. Börs to be still sick at home to-day as well as yesterday and the day before?
A. Yes, sir.
Q. You have heard Mr. Rouse testify?
A. Yes, sir.
Q. Do you remember his bringing up samples on the 15th of April to your office?
A. Yes, sir; I don't know the exact date, but I know he brought them.
Q. Do you remember his bringing the samples he testified about?
A. Yes, sir.
Q. Will you state what you know about those samples?
A. We called right away our broker, Mr. Walther, and, in the presence of Mr. Börs and myself, took those samples of lard and melted on the stove. After we melted them we let them cool a little, and found water at the bottom.

(Mr. Tracy objects to what they found in those samples, on the ground that there is no proof that they came from the 135 tierces in question.

199 Objection sustained, and exception taken by defendant.

The defendant excepts on the ground that the objection not having been made until after the answer was made it was not in time.)

The COURT. I sustain the objection and strike out the testimony, and give you an exception.

Q. Mr. Maziere, did you ever have any conversation with Mr. Wilson, who was examined here as a witness, with regard to the results of this examination and these samples after you had made it?

(Objected to on the ground that Mr. Wilson has not been examined on that subject, and has not testified in regard to it, and that the date shows it is after the assignment; objection sustained; exception taken by defendant.)

Q. Well, what do you know, Mr. Maziere, with regard to these samples that were examined at Mr. Börs' office on the occasion you speak of?

200 A. Some of them come from these 135 tierces of lard.

Gen. Tracy asks the court to instruct the witness to speak of his own personal knowledge.)

The COURT. Have you any personal knowledge that any of the samples of lard which you saw were taken from the 135 tierces of lard in question?

A. No, sir. I did not examine them myself; I don't know whether

they came from the dock or where they came from. We must take our inspector's good faith for that.

By Mr. FORSTER:

Q. What did you do with regard to the matter of taking those samples?

A. The samples we got in our office?

Q. What did you do about taking those samples?

A. We got them from Mr. Goullard, the sampler of the Exchange.

(Mr. Forster reads from Wilson's testimony as to the sampling of the lard before it was weighed.)

201 The COURT. That was not introduced for the purpose of showing the quality of the lard, but to show the course of business.

Q. Did you hear the testimony of Mr. Wilson?

A. Yes, sir.

Q. Did you hear the testimony of Mr. Rouse to-day?

A. Part of it.

Q. Did you hear his testimony as to a man by the name of Billy, who did the sampling, who took the samples which Mr. Rouse said he brought to your office on the 15th of April?

A. Yes, sir.

Q. Did any man named Billy take any other samples for you of those 135 tierces of lard than the samples which Mr. Rouse testified he brought and delivered to you on the 15th of April?

(Objected to; objection sustained; exception taken by defendant.)

Q. What sampling did Billy do for you or for Mr. Börs, if you know?

A. My relations were with Goullard and his firm; I don't know what his workmen did.

Q. All the sampling done for you or Mr. Börs was done by Mr. Rouse's firm of Goullard, Rouse & Co.?

202 A. We gave the order to them.

Q. And all samples received by you taken by Billy for your account were received through them?

A. Yes, sir.

Q. When did you receive those samples from them?

A. I don't know the date.

Q. You heard Mr. Rouse testify as to the samples on the 15th of April?

A. About the time of the shipment, but what date that was I do not remember.

Q. Do you recollect receiving any other samples at any other time except those he testified to?

A. We got them from Wilson, in the regular course of business.

Q. The only samples received by you taken by Billy were received at this one time; is that the fact?

A. Yes, sir.

Q. Did Mr. Wilson ever see any of the samples taken by Billy for you in Mr. Börs' office other than the samples delivered by Mr. Rouse on the occasion already testified to?

A. No, sir.

203 Q. Now, state what you did with those samples.

(Same objection, ruling, and exception.)

Q. Was not Mr. Wilson in your office after the 15th?

A. I think he disappeared after the 8th or 9th. Mr. Preston may be able to enlighten you on him.

Q. Didn't he come to your office after that?

A. I hardly think so.

By the COURT:

Q. Do you remember seeing him after that Monday, the 10th?

A. No, sir.

The COURT. I assume that ended his connection with the case.

Q. (Paper shown witness.) Just look at that letter, and see if that will refresh your recollection.

A. Yes, sir; that is a letter he wrote on the 17th of April, in answer to a conversation. On the 8th or 10th of April Mr. Wilson came to our office and was pretty badly treated there; we told him we would not do anything for him; we called him a swindler.

By Mr. TRACY:

204 Q. The question is whether he was there after the 11th.

A. No, sir; he was not there after the 10th of April.

Q. Then it does not refresh your memory.

A. No, sir.

By Mr. FORSTER:

Q. Who was the first person, Mr. Preston or Mr. Wilson, that came to the office of Mr. Börs, so far as you know personally, that you saw with regard to this business?

A. I think Mr. Preston, though I never had any personal relation with him except once.

Q. You think it was Mr. Preston?

A. Yes, sir.

Q. Do you recollect? Look at this paper of the 8th of February, 1876; isn't part of that in your handwriting?

A. It is all in my handwriting except the signature.

Q. Now, did you see Mr. Preston at the office of Christian Börs about this business at any time before that paper was drawn; and, if so, how many times?

A. I never had any conversation with Mr. Preston but once.

205 Q. Was that before this paper was executed?

A. No, afterward.

Q. Did you see Mr. Preston at the office?

A. I think I saw him once or twice.

Q. Before that paper was executed?

A. Yes, sir.

Q. Did you hear the conversation he had with Mr. Börs on either of these occasions?

A. I heard it, but do not know the circumstances any more.

Q. Did you hear the conversation on either occasion?

A. Only part of it.

Q. Where was the conversation held?

A. In Mr. Börs' private office.

Q. And how was that office arranged as to where you were? Where were you when Mr. Preston was there?

A. My desk was near the door of the private office, so that whatever he said inside I heard outside.

Q. Well, can you state when that paper was signed?

A. It must have been the 8th of February.

Q. You recollect the occasion, do you?

A. Yes, sir.

206 Q. Did you hear what took place on that occasion?

A. I think I made the agreement with Mr. Wilson himself; at least I had a great deal to do with it.

Q. You think you made the arrangement, drew it up in writing, and had Mr. Börs sign it.

A. I think that is the substance of it.

Q. Now, will you state what took place on that occasion?

(Gen. Tracy objects to all prior negotiations as immaterial, they being merged in the agreement.)

By the COURT:

Do you claim any benefit from the testimony that has been given that the defendant knew that Mr. Preston was to have the advances on this lard?

Gen. TRACY. No legal benefit.

The COURT. That being so, I will sustain your objection.

(Exception taken by defendant.)

Q. Now will you state what conversation you heard, so far as you heard it, between Mr. Preston and Mr. Börs prior to the execution of this agreement.

(Objected to.)

207 Mr. FORSTER. I offer in the same way to show the conversations between Mr. Preston and Mr. Börs in this regard.

(Same objection, ruling, and exception.)

Gen. TRACY. As this case now stands, there is only one question on which we can talk to this jury, namely, the value of the property—everything else is a question of law.

Mr. FORSTER Then your honor excludes the question and gives me an exception.

The COURT. I will exclude everything previous to the execution of the written agreement.

(Exception.)

The COURT. I will exclude everything previous to the execution of the written agreement.

(Exception taken by defendant.)

Q. These checks that have been put in evidence, in whose handwriting are they except the signature?

A. In the book-keeper's handwriting.

Q. What is his name?

A. Yeongeberg.

Q. Where is he?

A. In Europe.

Q. How long has he been there?

208 A. Eight or nine months.

Q. Gone there to reside, has he?

A. Yes, sir.

Q. Now come down to what was done in this paper of February 18th, 1876.

Q. Prior to the 16th of March, including that transaction, what was done as to sampling?

By the COURT:

Q. Give what took place; go on and state the course of transaction between the defendant and Wilson & Son, after this agreement was executed.

A. Wilson brought us one day a sample of 100 tierces of lard which he said he had ready to ship. We looked at it; it was very fine; gave him a shipping order; he shipped it; came to us with the receipt and the weigher's return, and we gave him a check. Some time afterward, may be a week or two weeks, I don't know the date, he came with another sample and showed the quality, which was all right; he got the
209 shipping order, brought the weigher's return, and received a check.

Q. I will show you these checks. The first transaction was February 16th.

A. I cannot swear to the dates, because there were so many.

By the COURT:

Q. That was the general course of transaction down to the last shipment in dispute?

Mr. FORSTER. (Interrupting.) That is to say at every time prior to and including the 29th of March, when you made the last advance of $6,300, he brought you a sample and the sample looked all right?

A. Yes, sir.

Q. And he brought you the shipper's receipt and weigher's return and got his check?

A. Yes, sir; and no other question asked.

Q. You acted on his sample?

A. Yes, sir.

By the COURT:

Q. Now what took place with reference to the 135 tierces in question?

A. We made an agreement in the latter part of March for him
210 to ship between 500 and 1,000 tierces of lard; I think it was the latter part of March.

Q. The first part of that shipment was on the 16th of March; the second on the 23rd; and third on the 29th; and fourth on the 3rd of April?

A. We gave him a shipping order.

(Gen. Tracy objects, and calls for the order.)

Examination of this witness suspended to examine Mr. Wilson as to the order.

RILEY P. WILSON recalled.

By Mr. FORSTER:

Q. Where is the shipping order you received for the lard you put on board the Auguste Andre under that order?

A. Left with the shipping clerk; I always delivered them to him.

Q. What shipping clerk?

A. Of the Auguste Andre.

Q. Whom did you leave it with?
A. I don't know what his name was; I left it at his office.
Q. Do you mean Mr. Edye, that was examined here the other day?
A. No. I got an order from Mr. Börs.
211 Q. I understand that. What did you do with that?
A. Gave it to the shipping clerk.
Q. Mr. Edye's clerk?
A. No.

By the COURT:

Q. What clerk do you mean?
A. At the steamship dock.

By Mr. FORSTER:

Q. Funch, Edye & Co.'s dock. The pier alongside the Pavonia Ferry, Jersey City?
A. Yes, sir.
Q. You delivered it to Funch, Edye & Co.'s clerk?
A. Yes, sir.
Q. Alongside Pavonia Ferry?
A. Yes, sir.
Q. When did you leave it there?
A. I think it was the 8th; the time I took that order.
Q. The 8th of April, 1876?
A. Yes, sir.
Q. In Jersey City?
A. Yes, sir.
Q. Have you ever seen it since?
A. No, sir.

HENRY DE MAZIERE recalled.

Direct examination continued by Mr. FORSTER:

Q. Now state what the shipping order was.

By the COURT:

Q. Give the substance of the order.
A. A shipping order reads as a rule, received so and so——
212 The COURT. Wait one moment. You gave him on a certain occasion a shipping order?
A. Yes, sir.
Q. In the latter part of March?
A. I should say it was.
Q. Now, give us the substance of the terms of that order.
A. Received of the clerk of such a steamer, or please receive from so and so, such a quantity of lard, or whatever it is, on such a date.
Q. It directed the steamer to receive from whom?
A. Christian Börs.
Q. How much?
A. The engagement for that steamer was between five hundred and a thousand tierces, I believe.
Q. It directed the steamer to receive from the defendant how much lard?

A. Such a quantity of lard, whatever it was.

By Mr. FORSTER:

Q. Do you remember the amount?

A. No, sir.

Q. You say either from five hundred to a thousand tierces of lard. Give the quantity.

Occasionally it states about.

213 Q. It is not always precise as to the amount?

A. No, sir.

By the COURT:

Q. It directed the steamer to receive a certain quantity of lard?

A. Yes, sir.

By Mr. FORSTER:

Q. Did it state how the lard was marked?

A. No, sir.

Q. Would the order contain the name of Wilson or his firm?

A. Not unless the shipping receipt calls for his name; the delivery order and the shipping receipt correspond as to the name of the person; the clerk at the dock makes out the ship's receipts from the delivery order.

A. Yes, sir.

Q. You handed the delivery order to Mr. Wilson?

A. Yes, sir.

Q. At his request?

A. Yes, sir.

By Gen. TRACY:

Q. The two correspond as to the amount?

A. No, sir.

By the COURT:

Q. Give us an illustration.

A. We make an engagement for five hundred or a thousand tierces of lard; we may ship 750 or 1,250.

214 Q. How does the order read?

A. It says: "Received from," a certain quantity of lard.

Q. Marked in any way?

A. No, sir; the carman comes there with his lard, produces the shipping order on the dock.

Q. It simply authorizes the steamer to act for the defendant in receiving whatever lard is offered?

A. Yes, sir.

By Mr. FORSTER:

By the COURT:

Q. Go on and state the transaction; you got the shipping order—what next took place?

A. Mr. Wilson came with the weigher's return and ship's receipt, and we gave him a check.

Q. Go on.

A. On the first shipment Wilson did not produce a sample.

By Mr. FORSTER:

Q. That is the shipment of the 8th of April?

A. The latter part of March he began that shipment.

Q. The last shipment, whenever it was?

215 A. Yes, sir; and we received no sample of it till Rouse, Goullard & Co. took a sample of it.

By the COURT:

Q. He didn't produce samples?

A. Not of the lard delivered upon the Auguste André on the first trip; then we requested Goullard, Rouse & Bostwick, on the 23rd of March and on the 27th or the 28th of March, to sample two lots of lard.

Q. The 23rd and 28th?

A. Yes, sir; or 29th—the latter part of March.

Q. Well, you requested them to sample the two lots which had been delivered?

A. Yes, sir; those were all Goullard sampled for us and Mr. Wilson.

Q. That is, these were the two lots which had been delivered to the steamer for which Wilson had got his checks?

A. Yes, sir.

By Mr. FORSTER:

Q. This bill gives the date as near as you have it?

A. Yes, sir; as near as we can get it.

Bill offered for the purpose of fixing the date is the 16th, and for that purpose only?

216 A. The next shipment took place the 6th or 7th of April; perhaps the 5th of April we gave him the order; it took several days to put it on board.

By the COURT:

Q. About April 5th, you say?

A. I should judge so; it might have been April first—from the 1st to the 5th.

A. Yes, sir.

Q. You say you gave him another shipping order?

A. Yes, sir.

Q. For the André?

A. Yes, sir; the same steamer; it was all the same engagement—the same engagement made. The quality was so poor that we refused to advance on it.

By Gen. TRACY:

Q. Something must have happened afterward.

A. He brought his receipts and weigher's return.

Q. For how many tierces?

A. 130 or 135.

By the COURT:

Q. That was the last delivery on the André; he did not bring any samples for it?

A. No, sir; the quality was so poor.

By Gen. TRACY:

Q. Wait a moment; he brought no samples?

A. No, sir.

217 Q. What did he do? What took place?

A. About the last shipment?

Q. Yes.

A. He came on Saturday; Mr. B s was sick at home; the quality was so poor——

Q. No, no; what was said; what took place? We will get at the quality hereafter.

A. I told him Mr. Börs was sick.

Q. What did he bring when he came on Saturday?

A. His regular return and ship's receipts.

Q. This weigher's return and ship's receipt?

A. Yes, sir; as customary. Mr. Börs being sick at home, I told him that under the circumstances I refused to act. I told him to come back on Monday.

Q. I suppose he wanted the checks that afternoon, and you declined to give them owing to Mr. B rs' sickness?

A. That same afternoon a clerk of Mr. Preston called too, and inquired about that check; that same afternoon, Saturday, I think, and I repeated the story that Mr. Börs was sick.

By Mr. FORSTER:

Q. Before you got through what took place between you and Mr.

218 Wilson on that Saturday?

A. I felt like kicking him out of the office.

By the COURT:

Q. When he called the first time you had received information to the effect that prior shipments were not satisfactory?

A. Yes, sir.

Q. And Mr. Börs being sick you declined to act in the matter until you could consult with him?

A. Yes, sir.

Q. Did you say anything to Wilson on that Saturday with regard to this telegram of which you had learned previous?

A. I told him there was something wrong about it, and would do nothing further until I could consult with Mr. Börs.

Q. When?

A. On Saturday, in the morning, when he came about 12 o'clock; may be one or two.

By Mr. FORSTER:

Q. In your own mind, you were acting on the information contained in this telegram?

A. Yes, sir.

Q. Did you say to him on that occasion, on that Saturday, "Come

219 in on Monday at 11 o'clock promptly and you shall have your check?"

A. Not to my knowledge; I told him to see Mr. Börs.

By the COURT:

Q. Are you sure that you told him in the first interview that there was something wrong about the transaction?

A. Yes, sir.

By Mr. FORSTER:

Q. At the first interview on that Saturday?

A. Yes, sir.

Q. Did he call on that Monday morning?

A. Yes, sir.

By the COURT:

Q. Didn't Mr. Preston come there on Saturday?

A. His clerk came, I think, and I told the same thing, that Mr. Börs was sick.

Q. That was on Saturday?

A. I think so, to the best of my knowledge.

By Mr. FORSTER:

Q. Did Wilson come back again on Monday morning?

A. Yes, sir; he did.

Q. Was Mr. Börs there?

A. He was there waiting for him.

Q. When Mr. Börs arrived you told him what had transpired?

A. Yes, sir.

220 Q. Well, now tell us all that occurred; you were present, were you?

A. Yes, sir.

Q. Tell us all that occurred on that Monday morning between Wilson and Mr. Börs while you were present.

By the COURT:

Q. Was Mr. Preston there?

A. Not the first time. The conversation was rather angry. I don't know exactly all the terms used, but Mr. Börs tendered him back all his goods and wanted his money back. Wilson said he would not do it, and Mr. Börs told him he would order all the lard sold on the arrival of the vessel at the best price he could get, and sue him for the difference. In answer to that, a week or ten days afterward, we got that letter which Mr. Forster has presented.

By Mr. TRACY:

Q. We will come to that by and by; go on with the interview on the 8th.

A. That was about all. Mr. Wilson left. I understood Mr. Wilson and Mr. Preston called afterwards, but I was not in the office. Mr. Wilson, Mr. Börs, and Mr. Preston saw each other, I believe, but I was

221 not there; I had something else to attend to, I suppose.

Q. That letter is the check showed you some time ago and wa dated the 17th?

A. Yes, sir.

Q. What, if anything, on that occasion did Mr. Börs say? I want you to go into the details of the matter.

A. At the first interview between Wilson and Mr. Börs at that time of course everything was explained.

Q. What did he tell him?

A. I don't remember the words used; only the substance.

Q. Give us the substance as to the lard.

A. That it was watered, that it was a swindle, and that he, that is Mr. Börs, wanted to get his money back. It is difficult using the same words.

By the COURT:

Q. This referred to the lard that had been sent on a prior vessel?

A. And to the last lot too; we had a sample.

Q. Mr. Börs offered him all the lard that was on the Auguste Andre?

A. Mr. Börs made him a tender of the whole property on board
222 that steamer and demanded his money back, but Wilson refused to give it.

By Mr. FORSTER:

Q. Did Mr. Börs have these receipts there then?

A. I think he did.

Q. What did Wilson say in reply to that offer?

A. He refused to give the money or do anything.

Q. Did Mr. Wilson state on that occasion that Mr. Börs' own inspector had told Mr. Wilson that the lard which Wilson was making was as good as Wilcox's, if not better?

A. I don't remember.

Q. Did you hear anything of that kind?

A. I don't remember.

Q. Did you hear anything of that sort being said by any inspector?

(Objected to; objection sustained; exception taken by defendant.)

Q. Did he, on that occasion, say that Mr. Preston had made advances on that lard?

A. He might and he might not. I don't remember.

Q. I understand that you did not hear the interview when Mr. Preston came there?

A. I was not in the office.

Q. Then you don't know that he came?

223 A. I heard afterward that he had been there, but don't know anything about the matter.

Q. Well, now, you have heard the testimony of Mr. Stillwell as to the examination made on the 19th and 20th of April, 1876?

A. Yes, sir.

Q. You remember that, do you?

A. I brought the samples upstairs and saw the chemist myself.

Q. Now, can you tell us what the samples Nos. 1, 2, and 3, respectively, were?

A. I cannot tell any more; I know it was the lard of Wilson, but don't know which was which.

Q. Which was No. 1, which was No. 2, and which was No. 3.

A. No, sir.

Q. But you know that they were all Wilson's lard?

By the COURT:

Do you know, of your own knowledge, whether there were samples taken from the 135 tierces?

A. If we believe in our inspector.

Q. Of your own knowledge?

A. No, sir; we are not on the dock.

224 Q. Your knowledge is derived only from information?

A. Yes, sir.

(Question objected to; objection sustained; exception taken by defendant.)

Q. Now, these three samples which were examined by the chemist, Nos. 1, 2, and 3, had they been put to any test or examination prior to that examination by the chemist? If so, what, when, where, and by whom?

(Objected to on the ground that there is no proof that they were samples taken from Mr. Wilson's lard.)

By the COURT:

Q. Who took the samples to the chemist; did you take them to him personally?

A. No, sir.

By Mr. FORSTER:

Q. Do you remember this letter of Mr. Preston's, which has been put in evidence, giving the address of Mr. Wilson at No. 150 Fulton street, room 12?

A. Yes, sir.

Q. Did you go to that place to find him?

(Objected to as being after the transaction; objection sustained;

225 exception taken by the defendant.)

Cross-examination by Gen. TRACY:

Q. Can you tell us when you obtained the bills of loading for these 135 tierces of lard?

A. I did not make them out.

By the COURT:

Q. Do you know when the bills of loading were received?

A. No, sir; not for the last shipment.

Q. Did you see them at all?

A. No, sir.

By Gen. TRACY:

Q. Do you know the fact that the lard went on that steamer?

A. Not for a fact I do not know it.

Q. Did you do the foreign correspondence of the house?

A. Yes, sir.

By Mr. TRACY:

Q. Is Exh. 2, which I now hand you, in your handwriting?

A. My handwriting and my signature.

Q. You made it out yourself?

A. Yes, sir.

Q. Can you produce that telegram?

A. We have not got it; I think you could get it from the tele-
226 graph company, if you apply for it.

Q. You have not got it?

A. No, sir.

Q. It was in your possession at one time?

A. It must have been.

Q. Do you know the date of it? You see the date of that memorandum?

A. Yes, sir.

Q. Now, can you tell me how long before the date of that memorandum of April 1st you had received the telegram that you referred to?

A. May be a day, may be an hour before.

By the COURT:

Q. It was received within a day or so?

A. Something like that.

By Mr. TRACY:

Q. Now, I understand you to say that Mr. Wilson presented no sample of the 135 tierces of lard?

A. No, sir; he did not.

Q. And that you had had no sample of that 135 tierces taken on the 8th of April?

A. No, sir.

Q. So that whatever statement you made to Mr. Wilson on the 8th of April in regard to the quality of the lard related to the previous
227 consignment and not to that of the 135 tierces, did it not?

A. Yes, sir.

Q. And you had no sample of the 135 tierces on the 10th of April, when he was there with Mr. Börs, had you?

A. It was taken afterwards, I think?

Q. You had none then on the 10th of April?

A. Mr. Goullard will be able to give the dates; I don't remember them.

Q. Do you remember that you had any sample of the 135 tierces of lard in the office when Mr. Wilson called on Monday morning, April 10th?

A. Not from the 135 tierces.

Q. So that all the information which Mr. Börs had on the subject of the quality of the lard related to the quality of the prior consignment, did it not?

A. No, sir.

Q. What knowledge had he, then, of the 135 tierces, that you know?

A. Mr. Wilson himself admitted to me that the lard was not so good as it ought to have been.

Q. When did he make that admission to you?

A. I think it was on the morning of the 10th, and gave us as
228 a reason, if you would like to know, that his foreman had made a mistake or something like that—some such remark.

Q. That related to the 135 tierces?

A. They were included in that.

Q. How do know, were they mentioned?

A. That includes the whole lot; it must have done so.

Q. Were the 135 tierces mentioned?

A. I should say, yes.

Q. You were talking with Mr. Wilson about your samples, were you not?

A. I suppose that was the way the conversation came up.

Q. Were those samples that you got on the 28th or 29th of March in the office on Saturday?

A. Certainly.

Q. When did you first learn of the quality of the lard that was sampled and the samples brought to you on the 28th or 29th of March?

A. I would like to explain.

Q. No matter about that.

A. I cannot answer, then. It requires an explanation for an answer.

Q. What was done with the samples brought to your office on
229 the 28th or 29th of March, both, and the 1st day of April?

A. They were kept there in a very cool place.

Q. Did you do anything with them immediately on their being brought there?

A. No, sir; only looked at them.

Q. Was that all you did?

A. For the present; yes, sir.

Q. When did you examine those samples with the view of ascertaining the quality?

A. After we got that telegram.

Q. Not till after the 8th?

A. Will you allow me to make a little remark?

Q. No; we are getting on very well; very well, indeed. You did not examine the samples obtained on the 28th or 29th of March until after the telegram of the 8th?

A. No, sir.

Q. Well, where was Mr. Börs when that telegram was received?

A. Sick at home.

Q. When did he see the telegram first?

A. If I remember, I sent one of the clerks up at night, or perhaps on Monday morning early; I used to send up to him in that way when he was not there, occasionally.

230 Q. Then Mr. Börs knew nothing of the telegram of the 8th until the night of that day or the morning of the 10th?

A. Yes, sir.

Q. What did you do with those samples immediately on receiving the telegram of the 8th?

A. Waited till Mr. Börs's arrival.

Q. On Monday morning?

A. Yes, sir.

Q. You did nothing with them?

A. No, sir.

Q. Then you had no knowledge at all of the quality of this lard, except the information that was communicated to you by the telegram of April 8th, up to Monday morning?

A. Yes, sir; the telegram was enough for me.

Q. That was the only information you had?

A. Yes, sir.

Q. Now, when did you first test any of those samples brought in on the 28th or 29th of March? When did you first test them?

A. I think about the 10th or 12th of April.
Q. After these interviews with Mr. Preston?
A. Yes, sir.
Q. So that even up to that time you had no knowledge on that point?
231 A. Mr. Börs may have had; I had not seen Mr. Preston.
Q. Now, you say you think Mr. Preston's clerk came 'round there on Saturday?
A. To the best of my knowledge, he did. He represented himself as Mr. Preston's clerk, and that was enough for me.
Q. Do you remember telling him that Mr. Börs was sick at home?
A. I believe I gave him the same answer.
Q. And that the check would be given on Monday morning, when Mr. Börs came down?
A. I disremember the words; I told him he was sick.
Q. Didn't you tell him that he would give him a check on Monday morning?
A. I don't remember.
Q. You will not swear that you did not say so?
A. I will not swear either yes or no, because I want to tell the truth.
Q. Will you not swear that you did not so inform Mr. Wilson?
A. No; because I had a quarrel that day with Mr. Wilson about the whole thing. I remember better about that than what I said to a casual stranger.
232 Q. Do you mean to say now that you did not tell Mr. Wilson that he could get his check on Monday?
A. I told Mr. Wilson that there was something wrong; to call and see Mr. Börs; I declined to act.
Q. Did not you tell him that he could get his check on Monday?
A. I doubt very much.
Q. Is that as strong as you will deny that you did so tell him?
A. I don't want to say yes or no, if I don't know it.
Q. I understand you to say that this order for the last consignment was issued somewhere from the 1st to the 5th of April.
A. Judging from the usual correspondence, yes, sir; I cannot remember dates.
Q. And now, did not Mr. Börs, in his conversation with Mr. Wilson, demand all his money back for the whole consignment of lard?
A. He tendered the receipts by that vessel, as per agreement. We made an engagement with him for 500 or 1,000 tierces of lard for that steamer. We tendered him the receipts for 571 tierces, and he would not receive them.
233 Q. Do you say that the receipts were produced there before Wilson and tendered to him?
A. Yes, sir.
Q. And the advance demanded back?
A. Yes, sir.
Q. But not for the previous shipments?
A. They were all going to Europe.
Q. Didn't you accompany that demand with the statement that you would give him back the lard on the steamer, provided he would return

to you or Mr. Börs the advance on the entire amount of lard, and that you would transfer the lard in Antwerp to his account?

A. I suppose we may have said "Give us back the money, and you will get the whole thing back; glad to get rid of you."

Q. That was the demand, was it not?

A. The demand was for what was on board the steamer; I don't remember anything else.

Q. Did not Mr. Börs demand as a condition that his whole advance should be returned to him, and that the lard on the other side should be transferred to the account of Wilson or any one else he might name?

234 A. I doubt very much.

Q. Will you say that it was not so?

A. Not on the first demand; it was not so.

Redirect by Mr. FORSTER:

Q. You have stated, in answer to Mr. Tracy, that you had some information, as corresponding clerk, with regard to the sale of this lard; is this the source of your information (handing witness Defendant's Exh. C for identification); that is, where you got the accounts of the sale of this lard?

A. Yes, sir.

Q. Is that the original signature of Nottlebohm Brothers?

A. Yes, sir.

(Paper offered in evidence; excluded; defendant excepts. Insert it.)

Q. You were asked the question as to when you learned the quality or condition of the samples, and you stated that you desired to make an explanation, when the counsel interrupted you; state what the explanation was you desired to make.

A. Although I am not an expert in lard, and do not pretend to

235 know much about it, yet I feel pretty positive——

Gen. TRACY. That won't do.

Q. Positive that what?

A. Positive that you cannot detect water at once when you look at the sample. It requires some kind of experience.

Gen. TRACY. I submit that the witness has disqualified himself from testifying before giving his opinion.

By Gen. TRACY:

Q. Were these samples that you took to the chemist those that were brought in on the 28th or 29th of March?

A. That was part of it.

Q. The samples that were brought in on the 28th or 29th of March?

A. Yes, sir.

By Mr. FORSTER:

Q. Now, when did you get the balance of those samples?

(Objected to; excluded on the ground that there is nothing to go to the jury in regard to those samples on the case as it stands.)

Mr. FORSTER. They having asked the question; we have a right to go into it now.

236 The COURT. I shall exclude all evidence in regard to these samples.

(Exception duly taken by defendant.)

RILEY P. WILSON recalled on behalf of the defendant:

By Mr. FORSTER:

Q. Just look at the printed blank I show you, and state if that is the blank which was filled up, which constituted the delivery order that you spoke of yesterday.

The COURT. You mean the order given by the defendant to the ship?

Mr. FORSTER. Yes, sir.

A. I think it was.

(Paper offered in evidence and marked "Defendant's Exh. No. 18.")

Q. (Handing witness several papers, purporting to be the receipts given on receiving the advances.) Look at these papers which I show you and state if they are signed by you. (Reading:) "Received New York, March, 1876, from Christian Börs, dollars, as an advance on W. 1–100 tierces of lard, to the consignment of Messrs. Nottlebohm Brothers,
237 Antwerp. Sales left to their judgment. Any balance due either party to be settled on demand.

"(Signed) R. P. WILSON & SON."

A. Yes, sir.

Q. Those are the receipts you gave on receiving such advances as Mr. Börs made you?

A. Yes, sir.

The COURT. Consider them read.

(Receipts marked, respectively, Exh's 19, 20, 21, 22, and 23.)

By Gen. TRACY:

Q. Had these shipments, the previous consignments of March 16, 23, and 29, been put on board ship when you went there?

A. No, sir; part of them had, part had not.

Q. Had they all been put on board by April 8th?

A. No, sir.

Q. The 135 tierces were on the dock on April 8th?

A. Yes, sir.

Q. Alongside the steamship?

A. Yes, sir.

By Mr. FORSTER:

Q. Did you see any of those tierces carted there?

A. All of them.

Q. How many tierces do they take on a cart?

A. About twelve, I think.

238 JOHN T. ROUSE, witness on behalf of defendant, being duly sworn, testified as follows:

Direct examination by Mr. FORSTER:

Q. You are with the firm of Goullard, Rouse & Bostwick?

A. Yes, sir.

Q. The firm that has already been mentioned?

A. Yes, sir.

Q. Their business is city weighers, provision, lard, and tallow inspectors?

A. Yes, sir.

Q. Their office at No. 36 Whitehall st.?
A. Yes, sir.
Q. Have you the original books of entry of that concern?
A. Yes, sir.
Q. Containing the entries of the inspection made on the 15th of April, 1876, for Mr. Börs?
A. Yes, sir.
Q. Turn to the first entry that was made, at page 114.
A. I have it.
Q. In whose handwriting is it?
A. John Michaels.
Q. What was he at that time?
A. Book-keeper of the firm.
Q. Did he keep that book?
A. Yes, sir.
Q. Where is he now?
A. Dead.
239 Q. And all the entries are in his handwriting?
A. Yes, sir.
Q. That book is the book of original entry with regard to the lard that was sampled by that concern at that time, was it.
A. Yes, sir.
(Entry offered in evidence, and objected to on the ground that it does not show that it relates to the lard in question; that there is no proof that it relates to the 135 tierces of lard, and also as incompetent.)

By Gen. TRACY:

Q. Do you know the course of business of your house at that time?
A. No, sir; I was not in their employ at that time.
Q. So that you don't know what the course of business was?
A. No, sir.

By Mr. FORSTER:

Q. You are the book-keeper at present?
A. Yes, sir.
The COURT. I assume that this was an entry made in the usual course of business.
Gen. TRACY. I assume not.
(Objection overruled; plaintiff excepts.)
240 Entry read in evidence as follows: "Page 114, Saturday, April 14, 1876; Christian Börs; Wilson; inspecting 135 tierces of lard; J. City, 5.40."

By Gen. TRACY:

Q. Do you know that handwriting to be that of the same party (pointing to the word "Wilson" written on the entry)?
A. I think so.
Q. Are you sure?
A. I should judge so.
Q. Will you swear to it?
A. I can look at my other book that that was transferred to and swear from that. This is the original entry.

Q. Have you got his name in another book where this same bookkeeper transferred it?

A. Yes, sir.

Q. Let me see it, will you?

By Mr. FORSTER:

Q. Now at look page 326 of the journal; in whose handwriting is that?

A. Mr. Michaels.

Q. The same one's?

A. Yes, sir.

Q. Was that entry made in the usual course of business?

A. Yes, sir.

(Entry offered in evidence, being the same as that just read from the other book.)

By Gen. TRACY:

241 Q. You think the same as to that?

A. Yes, sir.

Gen. TRACY. I did not observe this word "Wilson" on it at first, and I desire to take special objection to that. There being no evidence to connect the name of Wilson with the lard inspected for Börs, I ask to have that portion of the entry stricken out?

(Overruled; plaintiff excepts.)

Entry read in evidence as follows:

"Page 326 of the journal. Wilson; 15th April; to inspecting 135 tierces of lard; J. City, 5.40." Then credited 5.40.

Mr. FORSTER. That is our case, I believe, sir. I desire to call the attention of the court to section 3570 of the Revised Statutes, stating value of the kilogram as 2.2046 pounds. Also to section 3564 for fixing value of the florin.

Gen. TRACY. I desire to read in evidence part of the answer to the 6th interrogatory in the commission.

(Objected to by defendant.)

242 The defendant asked the court to direct the jury to find a verdict for the defendant.

(The presiding judge refused; to which refusal the defendant then and there duly excepted.)

The defendant asked the court to charge the jury that if the jury find that upon the shipment to the consignment of Brothers Nottlebohm, at Antwerp, of 100 tierces by the Auguste Andre of February 16th, arriving at Antwerp, March 5th, 1876, or of 242 tierces by the C. F. French, March 2nd & 6th, arriving at Antwerp, March 23rd, plaintiff's assignors, by a false sample, obtained from the defendant the advances he made on such consignment, and that the defendant learned on the 8th of April, 1876, of the fraid practiced on him, and that the lard shipped was not pure refined lard according to the sample presented by Wilson to obtain the advance, but adulterated with water, then the defendant was justified in the course taken on the 8th and 10th of April, and the verdict should be for the defendant.

243 (The presiding judge refused so to charge; to which refusal the defendant then and there duly excepted.)

The defendant asked the court to charge that if the jury find that fraud

was practiced by the plaintiff's assignor in obtaining the advances on the shipments by the first two vessels, then the defendant, on learning of the fraud was justified in rescinding the contract of February 8th, 1876, and in refusing to make any further advance.

(The presiding judge refused so to charge; to which refusal the defendant then and there duly excepted.)

The defendant asked the court to charge that if the jury find on the evidence of Mr. Edye and other evidence in the case that the lard was not in the defendant's possession or control, then he is not liable to an action for the conversion of the same.

(The presiding judge refuse so to charge; to which refusal the defendant then and there duly excepted.)

The defendant asked the court to charge that if the jury find that on the 8th of April, 1876, Mr. Maziere learned that the plaintiff's
244 assignors had practiced a fraud on defendant by obtaining advances on watered lard by means of false samples of pure lard, and that he communicated such information to the defendant, and that the defendant on the 10th of April refused to make any advance because Wilson had swindled him and the lard was watered, but offered to return the receipts for the shipment then on board the Auguste André, then the verdict must be for the defendant.

(The presiding judge refused so to charge; to which refusal the defendant then and there duly excepted.)

The defendant asked the court to charge that if the jury find that the infant, Odell Wilson, was a minor at the time of the transaction and rescinded the contract by setting up his infancy as a defence to defendant's suit to recover his advances, then the jury may find that there was no legal assignment of the claim to the plaintiff and that the plaintiff is not entitled to maintain this action.

(The presiding judge refused so to charge; to which refusal the
245 defendant then and there duly excepted.)

The defendant asked the court to charge that, as the firm of Wilson & Son consisted of Riley P. Wilson and his son, a minor, no valid assignment to the plaintiff of the claim has been proved, and their verbal assignment gave no title to the claim in suit.

(The presiding judge refused so to charge; to which refusal the defendant then and there duly excepted.)

The defendant asked the court to charge that, as the *defendant* and refusal alleged were made at Mr. Börs' office in New York, while the lard was on board the Auguste André at Jersey City, and not in defendant's possession, no claim in Wilson & Son existed against the defendant to be assigned.

(The presiding judge refused so to charge; to which refusal the defendant then and there duly excepted.)

The defendant requested the court to charge that the defendant never had any title to the 135 tierces; that plaintiff's remedy was against
246 the carriers with whom he had deposited the lard. The defendant was not in possession of the lard and could not be liable on a demand and refusal.

(The presiding judge refused so to charge; to which refusal defendant then and there duly excepted.)

Defendant requested the court to charge that there is no evidence of a conversion of the lard by the defendant. A conversion implies a wrongful disposition or a wrongful withholding of the property. The defendant never was in possession of this lard.

(The presiding judge refused so to charge; to which refusal defendant then and there duly excepted.)

Defendant requested the court to charge that defendant agreed to advance on whatever quantity of refined lard Wilson might consign through him for shipment to his friends in Europe, advances to be made after the goods are shipped and on presentation of the ship's receipts and proper weigh-master's returns. Wilson shipped the goods himself on the Auguste André to defendant's friends, Nottlebohm Brothers.

247 The goods were not in defendant's possession or control, and he is not liable to an action for their conversion. The only action he has made himself liable to is an action for breach of the agreement to advance—that is not this action. The goods were in the possession of the carriers en route to Brothers Nottlebohm. The defendant did not withhold the lard. He has done no wrongful act and made no wrongful disposition of it. Plaintiff has mistaken his remedy and defendant is entitled to a verdict.

(The presiding judge refused so to charge; and defendant then and there duly excepted.)

Defendant requested the court to charge that *if* defendant did nothing with this lard. Wilson put it on board the Auguste André himself April 8th; the steamer remained at her dock in Jersey City for a week after. Why did he not replevin it or demand it of the ship? She did not clear till the afternoon of the 15th or sail till the 16th, and plaintiff might have brought an action to try the title or right to the possession of this

248 lard against the carriers or Brothers Nottleborn, but not against the defendant.

(The presiding judge refused so to charge; to which refusal defendant then and there excepted.)

Defendant requested the court to charge the jury that the watering of lard is an adulteration and a fraud; that plaintiff cannot recover for the water in the lard, but only for the lard delivered on the Auguste André; and that if the jury find that defendant advanced on the lard shipped March 16th, 23rd, and 29th, or more lard than was in the shipment, by reason of the water in it, then for the excess there was a lien on the 135 tierces shipped on the same vessel April 8th, and plaintiff's assignors not having tendered such over-advances is not entitled to maintain this action, but the verdict must be for defendant.

(The presiding judge refused so to charge; to which refusal defendant then and there duly excepted.)

249 *Charge to the jury by the presiding judge.*

GENTLEMEN OF THE JURY: Plaintiff brings this action to recover of the defendant for the conversion of 135 tierces of lard, which it is alleged the defendant converted on or about the 10th day of April, 1876.

The plaintiff is the assignee of Wilson & Son under an oral agreement, by which Wilson & Son transferred to him any cause of action which might exist in their favor against the defendant. Wilson & Son had entered

into an agreement with the defendant, which is in writing and which I will read:

Dated New York, Feb'y 8th, 1876, and is directed to Messrs. Wilson & Son: "I herewith agree to advance you till further notice on whatever quantity of refined lard, not less than 100 tierces at one time, you may consign through me for shipment to my friends in Europe, at the rate of one cent less than at what Western lard is selling, the advance to
250 be made after the goods are shipped and on presentation of the ship's receipts and proper weigher's returns." Signed by the defendant.

Pursuant to this agreement Wilson & Son delivered at various times prior to the 8th of April quantities of lard, delivering it always at the ship, obtaining the weigher's returns and ship's receipts, which were immediately presented to the defendants, and thereupon the defendant paid over the advances.

On the 8th of April Wilson & Son delivered 135 tierces of lard to the shipping agent of the White Cross line. It seems, according to the course of business, that the shipping agent had given to the defendant a receiving order, which, in effect, authorized the ship to receive from the defendant such consignments as the defendant might desire to be received, and the defendant had given to Wilson & Son this order, which the latter presented to the shipping agent.

Wilson & Son thereupon obtained from the shipping agent a receipt showing the delivery of the 135 tierces of lard, obtained the
251 weigher's returns as had been done upon prior deliveries, presented them at the office of the defendant, and asked for the advance. Mr. Wilson, who was acting for the firm, called at the office of the defendant and was informed by the defendant's clerk that the defendant was sick; that he had gone home, and was requested to call on Monday morning. On Monday morning he called again, an interview followed, and the substance of what took place, in regard to which there is no particular dispute in the testimony, was this: The defendant insisted that the previous consignments of lard delivered by Wilson & Son were not satisfactory; that they were not such lard as it had been represented the defendant should have, and he refused to make the advances on the 135 tierces which had just been delivered; Wilson insisted then upon having the shipping receipts, and that the defendant should return the 135 tierces of lard. The defendant declined to do that, insisting that he would
252 return all the lard which was then upon the steamer, which included several hundred tierces of lard delivered before the 8th of April, upon which he had paid advances; he would return all that lard if Mr. Wilson would pay the entire amount which had been advanced upon it.

Wilson declined to that. Then Mr. Preston, who had made the advances to Wilson, was called in, and another interview took place, which in substance was similar to the former one with Wilson.

Now, gentlemen, upon these facts I instruct you that it was the right of Wilson & Son to insist upon the payment of the advance; that the payment of the advance was the condition of the delivery of the lard, and although it had been delivered to the defendant without insisting upon the advance, yet, according to the course of business between them, the advance

Defendant requested the court to charge that there is no evidence of a conversion of the lard by the defendant. A conversion implies a wrongful disposition or a wrongful withholding of the property. The defendant never was in possession of this lard.

(The presiding judge refused so to charge; to which refusal defendant then and there duly excepted.)

Defendant requested the court to charge that defendant agreed to advance on whatever quantity of refined lard Wilson might consign through him for shipment to his friends in Europe, advances to be made after the goods are shipped and on presentation of the ship's receipts and proper weigh-master's returns. Wilson shipped the goods himself on the Auguste André to defendant's friends, Nottlebohm Brothers.

247 The goods were not in defendant's possession or control, and he is not liable to an action for their conversion. The only action he has made himself liable to is an action for breach of the agreement to advance—that is not this action. The goods were in the possession of the carriers en route to Brothers Nottlebohm. The defendant did not withhold the lard. He has done no wrongful act and made no wrongful disposition of it. Plaintiff has mistaken his remedy and defendant is entitled to a verdict.

(The presiding judge refused so to charge; and defendant then and there duly excepted.)

Defendant requested the court to charge that *if* defendant did nothing with this lard. Wilson put it on board the Auguste André himself April 8th; the steamer remained at her dock in Jersey City for a week after. Why did he not replevin it or demand it of the ship? She did not clear till the afternoon of the 15th or sail till the 16th, and plaintiff might have brought an action to try the title or right to the possession of this

248 lard against the carriers or Brothers Nottleborn, but not against the defendant.

(The presiding judge refused so to charge; to which refusal defendant then and there excepted.)

Defendant requested the court to charge the jury that the watering of lard is an adulteration and a fraud; that plaintiff cannot recover for the water in the lard, but only for the lard delivered on the Auguste André; and that if the jury find that defendant advanced on the lard shipped March 16th, 23rd, and 29th, or more lard than was in the shipment, by reason of the water in it, then for the excess there was a lien on the 135 tierces shipped on the same vessel April 8th, and plaintiff's assignors not having tendered such over-advances is not entitled to maintain this action, but the verdict must be for defendant.

(The presiding judge refused so to charge; to which refusal defendant then and there duly excepted.)

249 *Charge to the jury by the presiding judge.*

GENTLEMEN OF THE JURY: Plaintiff brings this action to recover of the defendant for the conversion of 135 tierces of lard, which it is alleged the defendant converted on or about the 10th day of April, 1876.

The plaintiff is the assignee of Wilson & Son under an oral agreement, by which Wilson & Son transferred to him any cause of action which might exist in their favor against the defendant. Wilson & Son had entered

into an agreement with the defendant, which is in writing and which I will read:

Dated New York, Feb'y 8th, 1876, and is directed to Messrs. Wilson & Son: "I herewith agree to advance you till further notice on whatever quantity of refined lard, not less than 100 tierces at one time, you may consign through me for shipment to my friends in Europe, at the rate of one cent less than at what Western lard is selling, the advance to
250 be made after the goods are shipped and on presentation of the ship's receipts and proper weigher's returns." Signed by the defendant.

Pursuant to this agreement Wilson & Son delivered at various times prior to the 8th of April quantities of lard, delivering it always at the ship, obtaining the weigher's returns and ship's receipts, which were immediately presented to the defendants, and thereupon the defendant paid over the advances.

On the 8th of April Wilson & Son delivered 135 tierces of lard to the shipping agent of the White Cross line. It seems, according to the course of business, that the shipping agent had given to the defendant a receiving order, which, in effect, authorized the ship to receive from the defendant such consignments as the defendant might desire to be received, and the defendant had given to Wilson & Son this order, which the latter presented to the shipping agent.

Wilson & Son thereupon obtained from the shipping agent a receipt showing the delivery of the 135 tierces of lard, obtained the
251 weigher's returns as had been done upon prior deliveries, presented them at the office of the defendant, and asked for the advance. Mr. Wilson, who was acting for the firm, called at the office of the defendant and was informed by the defendant's clerk that the defendant was sick; that he had gone home, and was requested to call on Monday morning. On Monday morning he called again, an interview followed, and the substance of what took place, in regard to which there is no particular dispute in the testimony, was this: The defendant insisted that the previous consignments of lard delivered by Wilson & Son were not satisfactory; that they were not such lard as it had been represented the defendant should have, and he refused to make the advances on the 135 tierces which had just been delivered; Wilson insisted then upon having the shipping receipts, and that the defendant should return the 135 tierces of lard. The defendant declined to do that, insisting that he would
252 return all the lard which was then upon the steamer, which included several hundred tierces of lard delivered before the 8th of April, upon which he had paid advances; he would return all that lard if Mr. Wilson would pay the entire amount which had been advanced upon it.

Wilson declined to that. Then Mr. Preston, who had made the advances to Wilson, was called in, and another interview took place, which in substance was similar to the former one with Wilson.

Now, gentlemen, upon these facts I instruct you that it was the right of Wilson & Son to insist upon the payment of the advance; that the payment of the advance was the condition of the delivery of the lard, and although it had been delivered to the defendant without insisting upon the advance, yet, according to the course of business between them, the advance

Defendant requested the court to charge that there is no evidence of a conversion of the lard by the defendant. A conversion implies a wrongful disposition or a wrongful withholding of the property. The defendant never was in possession of this lard.

(The presiding judge refused so to charge; to which refusal defendant then and there duly excepted.)

Defendant requested the court to charge that defendant agreed to advance on whatever quantity of refined lard Wilson might consign through him for shipment to his friends in Europe, advances to be made after the goods are shipped and on presentation of the ship's receipts and proper weigh-master's returns. Wilson shipped the goods himself on the Auguste André to defendant's friends, Nottlebohm Brothers.

247 The goods were not in defendant's possession or control, and he is not liable to an action for their conversion. The only action he has made himself liable to is an action for breach of the agreement to advance—that is not this action. The goods were in the possession of the carriers en route to Brothers Nottlebohm. The defendant did not withhold the lard. He has done no wrongful act and made no wrongful disposition of it. Plaintiff has mistaken his remedy and defendant is entitled to a verdict.

(The presiding judge refused so to charge; and defendant then and there duly excepted.)

Defendant requested the court to charge that *if* defendant did nothing with this lard. Wilson put it on board the Auguste André himself April 8th; the steamer remained at her dock in Jersey City for a week after. Why did he not replevin it or demand it of the ship? She did not clear till the afternoon of the 15th or sail till the 16th, and plaintiff might have brought an action to try the title or right to the possession of this

248 lard against the carriers or Brothers Nottleborn, but not against the defendant.

(The presiding judge refused so to charge; to which refusal defendant then and there excepted.)

Defendant requested the court to charge the jury that the watering of lard is an adulteration and a fraud; that plaintiff cannot recover for the water in the lard, but only for the lard delivered on the Auguste André; and that if the jury find that defendant advanced on the lard shipped March 16th, 23rd, and 29th, or more lard than was in the shipment, by reason of the water in it, then for the excess there was a lien on the 135 tierces shipped on the same vessel April 8th, and plaintiff's assignors not having tendered such over-advances is not entitled to maintain this action, but the verdict must be for defendant.

(The presiding judge refused so to charge; to which refusal defendant then and there duly excepted.)

249 *Charge to the jury by the presiding judge.*

GENTLEMEN OF THE JURY: Plaintiff brings this action to recover of the defendant for the conversion of 135 tierces of lard, which it is alleged the defendant converted on or about the 10th day of April, 1876.

The plaintiff is the assignee of Wilson & Son under an oral agreement, by which Wilson & Son transferred to him any cause of action which might exist in their favor against the defendant. Wilson & Son had entered

into an agreement with the defendant, which is in writing and which I will read:

Dated New York, Feb'y 8th, 1876, and is directed to Messrs. Wilson & Son: "I herewith agree to advance you till further notice on whatever quantity of refined lard, not less than 100 tierces at one time, you may consign through me for shipment to my friends in Europe, at the rate of one cent less than at what Western lard is selling, the advance to
250 be made after the goods are shipped and on presentation of the ship's receipts and proper weigher's returns." Signed by the defendant.

Pursuant to this agreement Wilson & Son delivered at various times prior to the 8th of April quantities of lard, delivering it always at the ship, obtaining the weigher's returns and ship's receipts, which were immediately presented to the defendants, and thereupon the defendant paid over the advances.

On the 8th of April Wilson & Son delivered 135 tierces of lard to the shipping agent of the White Cross line. It seems, according to the course of business, that the shipping agent had given to the defendant a receiving order, which, in effect, authorized the ship to receive from the defendant such consignments as the defendant might desire to be received, and the defendant had given to Wilson & Son this order, which the latter presented to the shipping agent.

Wilson & Son thereupon obtained from the shipping agent a receipt showing the delivery of the 135 tierces of lard, obtained the
251 weigher's returns as had been done upon prior deliveries, presented them at the office of the defendant, and asked for the advance. Mr. Wilson, who was acting for the firm, called at the office of the defendant and was informed by the defendant's clerk that the defendant was sick; that he had gone home, and was requested to call on Monday morning. On Monday morning he called again, an interview followed, and the substance of what took place, in regard to which there is no particular dispute in the testimony, was this: The defendant insisted that the previous consignments of lard delivered by Wilson & Son were not satisfactory; that they were not such lard as it had been represented the defendant should have, and he refused to make the advances on the 135 tierces which had just been delivered; Wilson insisted then upon having the shipping receipts, and that the defendant should return the 135 tierces of lard. The defendant declined to do that, insisting that he would
252 return all the lard which was then upon the steamer, which included several hundred tierces of lard delivered before the 8th of April, upon which he had paid advances; he would return all that lard if Mr. Wilson would pay the entire amount which had been advanced upon it.

Wilson declined to that. Then Mr. Preston, who had made the advances to Wilson, was called in, and another interview took place, which in substance was similar to the former one with Wilson.

Now, gentlemen, upon these facts I instruct you that it was the right of Wilson & Son to insist upon the payment of the advance; that the payment of the advance was the condition of the delivery of the lard, and although it had been delivered to the defendant without insisting upon the advance, yet, according to the course of business between them, the advance

was to be paid when the weigher's return and ship's receipts were presented, and, if at that time the defendant refused to pay, he acquired no
253 right to the possession of the lard.

Now in disposing thus of the case, gentlemen, it is not necessary to take into consideration the motives which influenced either party. Some allegations have been made here against the good faith of the defendant.

The question of his good faith in the transaction has not been fully tried, because it has been my view that the rights of the parties were to be determined by the application of very well settled rules of law, which render it quite immaterial whether the defendant was acting in good faith or not; quite immaterial whether the lard which had been delivered before the 8th of April was such as he was entitled to have under his agreement with Wilson & Son or was not.

I regret that an action had not been brought to recover the balance of account between the parties in which all these transactions could have been investigated; the truth would have been ascertained and the amount
254 fairly and equitably due, if any, to the plaintiff or to Wilson & Son would have been recovered. But the plaintiff had the right to adopt the form of action which he has adopted. He had the right to insist that until this contract was complied with the defendant acquired no interest whatever in the lard which had been delivered to the ship.

He has taken that position, and if you find the facts to be as I have detailed them, and there is no conflict practically upon the evidence, then the plaintiff is entitled to recover.

It has been stated by one of the witnesses that the defendant himself could not have obtained the lard after it had once been delivered to the ship. That statement, gentlemen, is to be entirely laid aside as entitled to no consideration. The defendant, by refusing to return the lard and refusing to deliver over the shipping receipts, assumed to exercise control over the property; and that being so, the demand and refusal having been
255 shown, there is sufficient evidence of all essential facts necessary for the plaintiff's cause of action.

Plaintiff has shown his title, has shown that his property was in the possession of or under the control of the defendant, and shown that the defendant assumed to exercise control over it and refused without right to deliver it back; so that, gentlemen, upon the evidence in this case the only question for you to consider is the question of damages.

The plaintiff is entitled to recover the value of this lard at the city of New York on the day of its conversion.

I shall not advert to the evidence bearing on the question of value. You remember what the witnesses have testified to, and you will say what it was worth in the condition in which it was.

It is my duty to say, however, that you are to exclude from con-
256 sideration the testimony of the chemist, as to the amount of water, the extent of the adulteration of the lard, and that is for the reason there is not competent evidence in the case to show, that the samples analyzed by the chemist were samples taken from these 135 tierces of lard.

In all probability the samples were taken from the lard then on board the ship, but whether from the 135 tierces or not we do not know.

Cases must be tried according to the rules of evidence, and unfortunately the defendant has not been able to show that the samples thus analyzed

were taken from the lard in question. Therefore it will be your duty to disregard the analysis of the chemist in your consideration of the quality of the lard.

The plaintiff is entitled to recover the value of the lard at the time of its conversion, and also interest by way of damages, and the interest
257 under the law as it now stands will be six per cent. Therefore, your verdict will be for such a sum as represents fairly the value of the lard on the 10th of April, 1876, with interest at six per cent.

Mr. Preston says that the 135 tierces, at 14 cents a pound, would make 6,401.22.

It is not a difficult arithmetical calculation for you to ascertain how many pounds there were.

A dispute arising between counsel as to the weigher's bill, General Tracy recalls R. P. Wilson, who testified as follows:

Q. Mr. Wilson is that a press-copy of the weigh-bill you presented to Mr. Börs at that time?

A. That is a copy.

William I. Preston, being recalled in his own behalf, testified as follows:

Q. Is your computation of figures correct?

A. Yes, sir.

Gen. TRACY. I now desire the weigh-bill to go to the jury.

258 Mr. FORSTER. I desire to put in two computations also. One, that at 36 florins per killo—under the statute read for the killo, at the Treasury rate fixed for the florin—it would amount to $13\frac{6}{100}$ and at 29 florins it would amount to $10\frac{52}{100}$ of a cent per pound, and that the difference is $19\frac{49}{100}$ per cent.

The COURT (to the jury). I have permitted some evidence in this case as to the value of the lard at Antwerp upon the theory that it might throw some light upon its value in New York, but you are to bear in mind that you are to ascertain what it was worth in New York City.

The jury retire.

Counsel for the defendant except as follows to the judge's charge:

1st. To all of the requests to charge except so far as covered by the judge's charge.

2. To the proposition that it was the right of Wilson & Son to
259 insist upon the payment of the advance.

3rd. To the proposition that if the defendant refused to pay he acquired no right to the possession of the lard.

4th. To the proposition that plaintiff had the right to adopt the form of action which he has adopted.

5th. To the proposition that the statement of Mr. Edye that the defendant could not obtain the lard is to be laid aside and entitled to no consideration.

6th. To the proposition that the ship was the custodian of the defendant.

7th. To the proposition that the only question for the jury is the question of damages.

8th. To the proposition that they are to exclude from their consideration the testimony of the chemist as to the amount of water.

9th. To the proposition that the defendant was not able to show
260 that the samples which were analyzed were taken from the 135 tierces.

10th. To the proposition that the jury are to ascertain what the lard was worth in New York City.

And the said jury did then and there find a verdict for the plaintiff for the sum of seven thousand three hundred and thirteen dollars and ten cents.

And because none of the said exceptions so offered and made to the opinions and decisions of the said presiding judge do appear upon the record of the said trial therefor', on the prayer of the said defendant & his counsel, the said judge hath to this bill of exceptions put his hand and seal at the city of New York on this 12th day of March, A. D. 1880.

WM. J. WALLACE, [L. S.]
District Judge.

261 (Endorsed:) United States circuit court. William I. Preston against Christian Börs. Bill of exceptions and exhibits. Weekes & Forster, defendan'ts attorneys, 58 Wall street, New York City. U. S. circuit court. Filed Sep. 17, 1880. John I. Davenport, clerk.

262 Supreme Court of the United States.

CHRISTIAN BÖRS, PLAINTIFF IN ERROR,
against
WILLIAM I. PRESTON, DEFENDANT IN ERROR.

Afterwards, to wit, on the second Monday of October, in the same term, before the justice of the said court, at the Capitol, in Washington, comes the said plaintiff in error, by John A. Weekes, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit: that by the record aforesaid it appears:

1st. That the judgement aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgement ought to have been given for the said plaintiff against the said defendant.

2nd. That the judge who tried the cause erroneously admitted on such trial evidence offered by the defendant in error and objected to by
263 the plaintiff in error, whereas he should have excluded such evidence.

3rd. That the said judge erroneously excluded on such trial relevant and material and competent evidence offered by the plaintiff in error, whereas he should have admitted such evidence.

4th. That the said judge erroneously refused to charge the jury on such trial as requested by the plaintiff in error, whereas he should have charged such jury in accordance with the said several respective requests to charge submitted by said plaintiff in error.

5th. That the said judge erroneously charged the jury contrary to law under the facts in the case, whereas he should not have so charged. All

which will more fully and at large appear by reference to the exception, taken on such trial by the plaintiff in error and contained in the bill of exceptions and record herein.

And the said plaintiff prays that the judgement aforesaid for the errors aforesaid may be reversed, annulled, and altogether held for noth-
264 ing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgement.

JOHN A. WEEKES,
Att'y for Plaintiff in Error.

(Endorsed:) Supreme Court of the United States. Christian Börs, plaintiff in error, against William I. Preston, defendant in error. U. S. circuit court. Filed Oct. 5, 1880. Joseph M. Deuel, clerk.

265 *Bond for damages and costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

WILLIAM I. PRESTON, DEFENDANT IN ERROR,
vs.
CHRISTIAN BÖRS, PLAINTIFF IN ERROR.

Know all men by these presents that we, Jacob J. De Neufville, of the city, county, and State of New York, and George H. Forster, of said city, are held and firmly bound unto the above-named William I. Preston, in the sum of sixteen thousand dollars, to be paid to the said William I. Preston, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the fourth day of September, in the year of our Lord one thousand eight hundred and eighty.

Whereas the above-named Christian Börs has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York.

Now therefore the condition of this obligation is such, that if the above-named Christian Börs shall prosecute said writ of error to effect, and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

J. DE NEUFVILLE. [L. S.]
GEORGE H. FORSTER. [L. S.]

Sealed and delivered, and taken and acknowledged, this fourth day of September, 1880, before me.

FRED'K P. FORSTER,
Notary Public, N. Y. Co.

266 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Jacob J. De Neufville and George H. Forster, both of the city, county,

and State of New York, each being duly sworn, doth depose and say for himself that he is worth the sum of sixteen thousand dollars over and above all his just debts and liabilities.

J. DE NEUFVILLE.
GEORGE H. FORSTER.

Sworn to this fourth day of September, A. D. 1880, before me.
FRED'K P. FORSTER,
Notary Public, N. Y. Co.

(Indorsed :) U. S. circuit court. William I. Preston, defendant in error, vs. Christian Börs, plaintiff in error. Bond for damages and costs on writ of error. John A. Weeks, att'y for pl'ff in error, 58 Wall st., N. Y.

The within bond is approved. Sept. 6th, 1880.
SAM'L BLATCHFORD,
Circuit Judge.

U. S. circuit court. Filed Sept. 7, 1880.
JOHN I. DAVENPORT, *Clerk.*

267 UNITED STATES OF AMERICA, *ss:*

To William I. Preston, greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Christian Börs is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 6th day of September, in the year of our Lord one thousand eight hundred and eighty.

SAM'L BLATCHFORD,
Circuit Judge.

268 (Indorsed :) U. S. circuit court. William I. Preston, defendant in error, vs. Christian Börs, plaintiff in error. Citation. John A. Weekes, att'y for pl'ff in error, 58 Wall st., New York. U. S. circuit court, Sep. 7, 1880, John I. Davenport, clerk.

Due service of a copy of the citation within contained is hereby admitted.

Dated September 7, 1880.

B. F. TRACY,
Att'y for D'f't ad Error.

(Indorsement on cover :) No. 178. Christian Börs, plaintiff in error, vs. William I. Preston. S. New York, C. C. U. S. Filed 25' October, 1880.

111-252

NOV 20 1883

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1883.
No. 178.

CHRISTIAN BORS, Consul for the Kingdoms of Norway and Sweden,
Plaintiff in error.

vs.

WILLIAM I. PRESTON,
Defendant in error.

BRIEF FOR PLAINTIFF IN ERROR.

HENRY G. DEFOREST,
GEORGE H. FORSTER,
OF COUNSEL.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

CHRISTIAN BORS, Consul for the Kingdom of Norway and Sweden, *Plaintiff in Error,* *against.* WILLIAM I. PRESTON, *Defendant in Error.*	No. 178.

In Error to the Circuit Court of the United States for for the Southern District of New York.

Brief for Plaintiff in Error.

STATEMENT OF FACTS AND PROCEEDINGS AT THE TRIAL BELOW.

This action was brought in May, 1877, by William I. Preston, a citizen of New York, in the Circuit Court of the United States, for the Southern District of New York, against Christian Bors, also a citizen of New York, the Consul for the Kingdoms of Norway and Sweden, to recover damages alleged to have been sus-

tained by Wilson & Son, for the conversion of 135 tierces of lard, under an assignment by Wilson & Son to Preston, of their claim for damages for said conversion. (Complaint, fol. 6-8.)

On February 8th, 1876, Mr. Bors agreed to advance Wilson & Son, until further notice, on whatever quantities of refined lard, not less than one hundred tierces at a time, they might consign through him for shipment to his friends in Europe, at the rate of one cent less than Western lard was selling for; advances to be made after the goods were shipped, and on presentation of the ships receipts, and proper weighmasters returns (fol. 69). Under this agreement they made consignments to to Brothers Nottebohm, Antwerp, on which they received advances from the plaintiff in error, February 16th, by steamer Auguste Andre, 100 tierces, which arrived at Antwerp, March 5th, 1876, March 1st and 7th, by steamer C. Funch, 100 tierces, by bill of lading, dated March 1st, and 142 tierces by bill of lading, dated March 7th, which arrived March 23d, 1876.

The manner in which the advances were obtained on this 342 tierces of lard was thus described by Mr. Maziere. Wilson brought a sample, we looked at it, it was very fine, gave him a shipping order. He shipped it, came to us with the receipt and the weighers return, and we gave him a check (fol. 208).

On the 16th of March, a further consignment of from 500 to 1,000 tierces was arranged for by the Auguste Andre, at Jersey City; of this Wilson & Son, put on board 104 tierces March 16th, 150 tierces March 23d, 140 tierces March 29th, and the 135 tierces in question April 8th.

On April 8th, before the Auguste Andre sailed, or all the lard was on board, there was received at Mr. Bors'

office, while he was ill at home, a cable from his friends Nottebohm, that the lard was watered and adulterated, and worth perhaps between 30 and 31 guilders On that same day, Wilson & Son delivered to the Antwerp steamer, Auguste Andre, the 135 tierces of lard, the fourth lot of the 1,000 tierces proposed to be shipped by that steamer, being the lard in question, and called at Mr. Bors' office at half-past two in the afternoon with the weigher's receipts and shipping bill, and requested a check. There was at that time on the Auguste Andre, 394 tierces of lard. Mr. Bors' bookkeeper reported his sickness, and told him to come in Monday morning and see Mr. Bors. He called Monday, saw Mr. Bors, who said the lard was not what it ought to be, was watered, and declined to make any advance, and tendered him back his goods, and demanded the money back, which had been advanced on the 394 tierces, then on board the Auguste Andre. Wilson said he would not do it (fol. 220). Mr. Bors made him a tender of the whole property on board that steamer, and demanded his money back. Mr. Bors had the receipts there, and tendered them to Wilson, who refused to receive them (fol. 222). Mr. Bors refused to make any further advance, because the lard was adulterated, and the whole thing was a swindle. Preston after seeing Bors, and learning the facts, bought for one dollar, the right of action of Wilson; there was no written assignment. At the time of these transactions, Mr. Bors was and continued till the trial the consul for Sweden and Norway, at the port of New York, and had been such for a great many years (fol. 120, and he was sued as such. The defenses, were

1st. A general denial.

2d. That plaintiff's only interest in the event of

tained by Wilson & Son, for the conversion of 135 tierces of lard, under an assignment by Wilson & Son to Preston, of their claim for damages for said conversion. (Complaint, fol. 6-8.)

On February 8th, 1876, Mr. Bors agreed to advance Wilson & Son, until further notice, on whatever quantities of refined lard, not less than one hundred tierces at a time, they might consign through him for shipment to his friends in Europe, at the rate of one cent less than Western lard was selling for; advances to be made after the goods were shipped, and on presentation of the ships receipts, and proper weighmasters returns (fol. 69). Under this agreement they made consignments to to Brothers Nottebohm, Antwerp, on which they received advances from the plaintiff in error, February 16th, by steamer Auguste Andre, 100 tierces, which arrived at Antwerp, March 5th, 1876, March 1st and 7th, by steamer C. Funch, 100 tierces, by bill of lading, dated March 1st, and 142 tierces by bill of lading, dated March 7th, which arrived March 23d, 1876.

The manner in which the advances were obtained on this 342 tierces of lard was thus described by Mr. Maziere. Wilson brought a sample, we looked at it, it was very fine, gave him a shipping order. He shipped it, came to us with the receipt and the weighers return, and we gave him a check (fol. 208).

On the 16th of March, a further consignment of from 500 to 1,000 tierces was arranged for by the Auguste Andre, at Jersey City; of this Wilson & Son, put on board 104 tierces March 16th, 150 tierces March 23d, 140 tierces March 29th, and the 135 tierces in question April 8th.

On April 8th, before the Auguste Andre sailed, or all the lard was on board, there was received at Mr. Bors'

office, while he was ill at home, a cable from his friends Nottebohm, that the lard was watered and adulterated, and worth perhaps between 30 and 31 guilders On that same day, Wilson & Son delivered to the Antwerp steamer, Auguste Andre, the 135 tierces of lard, the fourth lot of the 1,000 tierces proposed to be shipped by that steamer, being the lard in question, and called at Mr. Bors' office at half-past two in the afternoon with the weigher's receipts and shipping bill, and requested a check. There was at that time on the Auguste Andre, 394 tierces of lard. Mr. Bors' bookkeeper reported his sickness, and told him to come in Monday morning and see Mr. Bors. He called Monday, saw Mr. Bors, who said the lard was not what it ought to be, was watered, and declined to make any advance, and tendered him back his goods, and demanded the money back,which had been advanced on the 394 tierces, then on board the Auguste Andre. Wilson said he would not do it (fol. 220). Mr. Bors made him a tender of the whole property on board that steamer, and demanded his money back. Mr. Bors had the receipts there, and tendered them to Wilson, who refused to receive them (fol. 222). Mr. Bors refused to make any further advance, because the lard was adulterated, and the whole thing was a swindle. Preston after seeing Bors, and learning the facts, bought for one dollar, the right of action of Wilson; there was no written assignment. At the time of these transactions, Mr. Bors was and continued till the trial the consul for Sweden and Norway, at the port of New York, and had been such for a great many years (fol. 120, and he was sued as such. The defenses, were

1st. A general denial.

2d. That plaintiff's only interest in the event of

the action, was jointly with Wilson & Son, and that they were necessary parties to the action.

3d. Fraud in the shipments by the Auguste Andre, by which the plaintiff in error was induced to and did advance, $17,660, besides $222.91 for insurance and brokerage of which, after the application of the proceeds of the entire 529 tierces by that vessel received and sold by Brothers Nottebohm, for account of Wilson & Son there was an unpaid balance of $1,078.51 for which the defendant counterclaimed.

4th. The advances on the February lard.

5th. The fraud in procuring advances on the February lard, (record fol. 10–16). The plaintiff served a reply to the counterclaim, denying each and every allegation contained in the answer respecting the same (fol. 17, 18.)

The defendant in error called as a witness, Riley P. Wilson, who was one of the firm of Wilson & Son, which consisted of himself and son, Odell Wilson, who was an infant under age. After the lard had been sold in Antwerp, he and his son were sued by the plaintiff in error to recover the unpaid balance of the advances, and he set up for his son as a defence to that suit that his son was a minor and under age at the time of the transaction. After this transaction the concern changed its name from Wilson & Son to O. Wilson, & Co., consisting of the same partners, in what he called the butter business. The plaintiff in error offered to show that that business was for the sale of oleomargarine for butter, but the evidence was excluded and the plaintiff in error duly excepted, (fol. 81.) The plaintiff in error offered to show that he was tried at Special Sessions for selling this oleomargarine for butter in October 1877, but the evidence was excluded, and the plaintiff

in error duly excepted, (fol. 81.) The concern commenced the so-called manufacture of this watered lard, at 188 West Houston Street in the year 1875, and in the fall of 1876 gave that up and commenced, what he called the butter business at the same place. The plaintiff in error offered to show on his cross-examination how long they continued in the butter business, but the Court excluded the evidence and the plaintiff in error duly excepted, (fol. 82.) At the time of the trial they were engaged in mining and reduction works in Colorado, where he had been a little over a year, having left New York in June, 1878. Wilson testified, on his direct examination, to the agreement with the plaintiff in error, and to the several consignments and course of business under it, on cross-examination that he had been at the office of the plaintiff in error three or four times previously, that Mr. Bors he did not know; that there were two gentlemen there; he thought he saw Mr. Bors' clerk, who was in Court, there at the time. The question: "did you see Mr. Bors, "himself, each time you were there?" was excluded and and plaintiff in error excepted, the question whether the first time he was there was more than ten days before the 8th of February, (when the agreement to advance was made,) was excluded and plaintiff in error excepted, (fol. 86.) One of the defences to this action was that the transaction was a fraud in obtaining advances on watered lard, on false samples, shown at the time the advances were obtained, which were pure, while the lard consigned was adulterated with water, and that the defendant in error as well as Wilson & Son, were parties to the fraud. The view taken by the Court at the trial, seemed to be that under the agreement of February 8th, each

lot of lard on which an advance was asked was a separate transaction, and that the plaintiff in error was bound to advance on the 135 tierces which went on board the Auguste Andre, April 8th, irrespective of the condition of the 394 tierces which Wilson & Son had put on board the vessel on previous days and obtained advances on. The theory of the plaintiff in error on the other hand was that the 1000 tierces which were to go by the August Andre on this voyage were one transaction, and that the fraud might be shown as a defence to the action. Wilson, on cross-examination, testified that prior to the 8th of February the defendant in error called with him on Mr. Bors about this business, and that he also said that he had had one interview with Mr. Bors and that Mr. Bors rather discouraged the shipment of lard; he discouraged Preston, he discouraged everybody until February 8th. At this stage of the trial it appeared that the plaintiff in error was ill from inflammatory rheumatism and unable to leave his house. The Court declined to allow a juror to be withdrawn, on the ground the he was not taken ill since the commencement of the trial and was not a necessary witness (fol. 89.) All the checks which Wilson & Son received from the plaintiff in error for advances on the lard were endorsed by them over to the defendant in error, who received the proceeds of the same. The question to Wilson on cross-examination, "when did you say was the next (second) consignment you made," was excluded by the Court on the ground that the inquiry must be limited, that the only question was about the last lot of lard; also the question: "In how many different vessels was the lard which you consigned shipped?" the plaintiff in error duly excepted (fol. 93,). 104 tierces went on board the Auguste Andre on March 16th, and

$4,000 was advanced; 150 tierces went on board on March 23d, and $6,000 was advanced; 140 tierces went on board March 29th and $6,300 was advanced, 135 tierces went on board April 8th, and an advance was refused on the ground that Mr. Bors had learned by cable from Antwerp that the previous shipment was adulterated with water. Wilson testified that Mr. Bors said he would return the receipts of the shipments by the Auguste Andre, including the shipment in question, but did not *demand* the return of his advances. He offered to do it, and put that offer on the ground that the lard was watered (fol. 102). Mr. Bors wanted his money back, on the ground that Wilson had swindled him and watered the lard. Wilson insisted he should carry out the contract. The 529 Tierces, including the 135 in question, when sold in Antwerp, September 22d, 1876, realized 77,230 francs, equivalent to about $15,500. while $16,900 advance had been obtained on the first 394 tierces which Wilson & Son put on board the Auguste Andre before they put the 135 tierces on board. Wilson could not tell how much lard he refined in March without looking at his books, which were in Colorado, but all the lard he refined in March went on board the Auguste Andre (fol. 107). It was branded W., known as Wilson & Son's lard, and no shipments were made to Antwerp except those through Mr. Bors; he took all they did in March. The evidence as to the assignment of the claim to defendant in error was confused, first Wilson testified that he assigned the claim to Preston, whom he owed for advances on the stock which Preston had purchased in order to enable Wilson & Son to refine the lard in question (fol. 72); then that it was a written assignment (fol 111); then that he was not sure; then that he told Preston he was owing him,

and must make this assignment to secure him, and that his son was a witness. The defendant in error, examined as a witness, testified that he bought the lard on Wilson's orders, advanced the money, and received the checks given by Mr. Bors. He also testified to a call on plaintiff in error with Wilson on April 10th, and to a conversation with Mr. Bors. He swore the value of the lard to be $6,401.22, and the interest on it $1,796.86, making the total amount $8,198.08. The jury evidently found the lard to be adulterated, as in the verdict for $7,313.10, they cut this amount down about 11 per cent. On cross-examination Preston testified to seeing Mr. Bors twice prior to the 8th of February. He was then asked by counsel for the plaintiff in error whether he did not refer to Mr. Walther in that connection. The Court here interrupted the cross-examination, and told the witness to state what he did. The counsel for the plaintiff in error then proved that Preston knew Mr. Walther, that he was introduced to him by Mr. Fisher, and he then asked Preston: Q. Did not you have a conversation with Walther at your office in the latter part of 1875, when Mr. Fischer brought him there, in which you told Mr. Walther that you had a proposition to go into the refining business with some party, and asked him what his idea of the business was? A. No, sir; I did not, most emphatically. Q. Did you not have a conversation with Mr. Walther at your office about the refining of lard? Excluded, and plaintiff in error duly excepted (fol. 125); later plaintiff in error followed this up by calling Mr. Walther, and offered to prove the interview with Preston at Preston's office through Fisher's introduction, and that Preston stated to Walther that he had a proposition to go into the

business of refining lard with some person, and asked his advice on that subject. This evidence was excluded, and the plaintiff in error excepted (fol. 151). On Preston's cross-examination the following question was asked: Q. In the interview that you had with Mr. Bors prior to the 8th of February, did not he call your attention to the necessity in shipping lard to Antwerp that it should be pure refined lard, because they had not the materials there to refine it or to take any adulterating substance out? Excluded, and plaintiff in error excepted (fol. 131.) Q. Do you recollect whether shortly before or on the 16th of January, 1877, you received the account of sales of this lard in Antwerp? Excluded, and plaintiff in error excepted (fol. 134.) Preston saw all the weigher's returns and ship's receipts for the lard before they were sent to Mr. Bors. Some of them he sent up to Mr. Bors office by his clerks. In reply to the request of Mr. Bors for the address of Wilson, Preston stated his office to be 160 Fulton street (fol. 58,) although Wilson testified that his only office was 188 Houston street; Preston swore that on the occasion when the plaintiff in error refused to make any further advance, he said the lard was adulterated by water, that his friends at Antwerp had so cabled him, and he showed samples which had water in them. When the plaintiff in error went into his defense he proposed to show by Mr. Walther, an expert, who had examined all the lard on the Auguste Andre, its adulteration, but the Court limited the examination to the 135 tierces in question (f. 151). Mr. Walther testified that it could not be stated exactly except by chemical analysis, but from his examination, the 135 tierces in question contained from 10 to 15 or 20 per cent. of water. He had a conversation

with Wilson before he began the introduction of this lard, as to what was necessary if he should introduce his lard. When, where, and what the conversation was, was excluded by the Court, under the exception of the plaintiff in error. Q. Now you can state what the value of lard would be on the 11th of Aprll, 1876. in the City of New York, that had from 10 to 15 or 20 per cent. water in it, such lard as you found this to be? Excluded, on the ground that there is no such proof in the case. Plaintiff in error duly excepted (fol. 154). The narrow view, taken by the Court, again appeared, when it was proved that the counsel for the plaintiff in error did not learn of Mr. Bors' illness till after the trial had commenced, and the Court held that it made no difference to the defence whether Mr. Bors was present or not (fol. 162). Mr. Brandt went to Europe in February, to investigate frauds on Wilson & Co's. lard and returned in June. He went to the house of Brothers Nottebohm; the lard of Wilcox & Son was offered him in various places in Europe, and he saw the samples in Antwerp. He saw no samples anywhere else. Wilson had already proved that all the lard he manufactured during this period was taken by Mr. Bors and shipped to Antwerp, and that he sent no lard anywhere else, but all questions put to the witness to show the condition of the lard in Antwerp, were excluded. Q. Did you see any samples of the lard of Wilson and Son there in Antwerp? (fol. 164); after several inquiries by the Court, excluded, and exception taken by plaintiff in error. Q. Did you examine and test those samples that you saw in Antwerp? What was the condition of the lard you saw examined? (folio 165). Q. Will you state the condition of those samples of this lard which you saw at this broker's office? (folio 169).

Q. State what effect the adulteration has on lard in Antwerp, as to its market value, or as to its being saleable (fol. 169). Q. What effect on the value of lard for shipment to Antwerp would its adulteration with water have had on or about the 8th of April, 1876, on its value in New York city? Q How common was the adulteration of lard with water at that time in 1876? The opinion of the witness as to the value of the samples he saw at the office of P. Cantreels Van Aerven, the broker at Antwerp, who had all the lard (fols. 47, 48), whose deposition was received in evidence (fol. 167), during Mr. Brand's examination, was excluded (fol. 171), and the plaintiff in error excepted. The telegram of April 8th, 1876, that Wilson's lard was watered and adulterated, was excluded, on the ground that it related to the lard which was shipped prior to April 8th (fols. 176, 177), the plaintiff in error excepted. On the examination of Mr. Rouse, of Goullard, Rouse & Bostwick, who took samples for Mr. Bors, the Court again excluded all evidence except that relating to the 135 tierces The Court expressly excluded evidence as to the taking of samples of the 394 tierces, representing the first three ship's receipts of the AugusteAndre's shipment, and the plaintiff in error excepted (fol. 192). The plaintiff in error sought further to prove the weight of the 394 tierces put on the Auguste Andre, prior to the putting on board of the 135 tierces, and to prove how much lard was actually in such 394 tierces, and to show that the $16,900 not only covered the quantity of lard in such 394 tierces, but also the greater portion of that in the 135 tierces, but this evidence was excluded, and the plaintiff in error excepted (fol. 196). The evidence of Mr. Maziere, as to the quality of the lard, was excluded, on the

with Wilson before he began the introduction of this lard, as to what was necessary if he should introduce his lard. When, where, and what the conversation was, was excluded by the Court, under the exception of the plaintiff in error. Q. Now you can state what the value of lard would be on the 11th of Aprll, 1876. in the City of New York, that had from 10 to 15 or 20 per cent. water in it, such lard as you found this to be? Excluded, on the ground that there is no such proof in the case. Plaintiff in error duly excepted (fol. 154). The narrow view, taken by the Court, again appeared, when it was proved that the counsel for the plaintiff in error did not learn of Mr. Bors' illness till after the trial had commenced, and the Court held that it made no difference to the defence whether Mr. Bors was present or not (fol. 162). Mr. Brandt went to Europe in February, to investigate frauds on Wilson & Co's. lard and returned in June. He went to the house of Brothers Nottebohm; the lard of Wilcox & Son was offered him in various places in Europe, and he saw the samples in Antwerp. He saw no samples anywhere else. Wilson had already proved that all the lard he manufactured during this period was taken by Mr. Bors and shipped to Antwerp, and that he sent no lard anywhere else, but all questions put to the witness to show the condition of the lard in Antwerp, were excluded. Q. Did you see any samples of the lard of Wilson and Son there in Antwerp? (fol. 164); after several inquiries by the Court, excluded, and exception taken by plaintiff in error. Q. Did you examine and test those samples that you saw in Antwerp? What was the condition of the lard you saw examined? (folio 165). Q. Will you state the condition of those samples of this lard which you saw at this broker's office? (folio 169).

Q. State what effect the adulteration has on lard in Antwerp, as to its market value, or as to its being saleable (fol. 169). Q. What effect on the value of lard for shipment to Antwerp would its adulteration with water have had on or about the 8th of April, 1876, on its value in New York city? Q How common was the adulteration of lard with water at that time in 1876? The opinion of the witness as to the value of the samples he saw at the office of P. Cantreels Van Aerven, the broker at Antwerp, who had all the lard (fols. 47, 48), whose deposition was received in evidence (fol. 167), during Mr. Brand's examination, was excluded (fol. 171), and the plaintiff in error excepted. The telegram of April 8th, 1876, that Wilson's lard was watered and adulterated, was excluded, on the ground that it related to the lard which was shipped prior to April 8th (fols. 176, 177), the plaintiff in error excepted. On the examination of Mr. Rouse, of Goullard, Rouse & Bostwick, who took samples for Mr. Bors, the Court again excluded all evidence except that relating to the 135 tierces The Court expressly excluded evidence as to the taking of samples of the 394 tierces, representing the first three ship's receipts of the Auguste Andre's shipment, and the plaintiff in error excepted (fol. 192). The plaintiff in error sought further to prove the weight of the 394 tierces put on the Auguste Andre, prior to the putting on board of the 135 tierces, and to prove how much lard was actually in such 394 tierces, and to show that the $16,900 not only covered the quantity of lard in such 394 tierces, but also the greater portion of that in the 135 tierces, but this evidence was excluded, and the plaintiff in error excepted (fol. 196). The evidence of Mr. Maziere, as to the quality of the lard, was excluded, on the

ground that there was no proof that they came from the 135 tierces (fols. 198, 203), although Martin Rouse had testified (fol. 193), that he delivered the samples fromthe 135 tierces to Mr. Maziere, at Mr. Bors' office, on the 15th of April (fol. 193), and Mr. Maziere had testified to his recollection of Mr. Rouse bringing them (fol. 198). On Mr. Maziere's examination the Court also excluded all evidence of what was said prior to the agreement of February 8th, and the plaintiff in error excepted (fols. 206-207). The evidence of Mr. Maziere showed that the shipments by the Auguste Andre were under an arrangement, for the shipment by that vessel, of from 500 to 1,000 tierces, and that the receipts for all that was on the Auguste Andre were tendered to Wilson, and he would not receive them (fol. 232).

The Court was asked to direct the jury to find a verdict for the defendant, at the close of the evidence for plaintiff, but declined then to entertain the motion (fol. 149); a like motion was made at the close of all the evidence, declined by the Court, and the plaintiff in error duly excepted.

The plaintiff in error asked the Court to charge the jury, that if the jury find that upon the shipment to the consignment of Brothers Nottebohm, at Antwerp, of 100 tierces by the Auguste Andre, of February 16th, arriving at Antwerp, March 5th, 1876, or of 242 tierces by the C. F. Funch, March 2nd and 6th, arriving at Antwerp, March 23rd, plaintiff's assignors, by a false sample, obtained from the defendant, the advances he made on such consignments and that the defendant learned on the 8th of April, 1876, of the fraud practiced on him, and that the lard shipped was not pure refined lard according to the sample presented by Wilson, to obtain the advance, but adulterated with water,

then the defendant was justified in the course taken on the 8th and 10th of April, and the verdict should be for the defendant.

(The presiding judge refused so to charge, to which refusal the plaintiff in error duly excepted).

The plaintiff in error asked the Court to charge that if the jury find that fraud was practiced by the plaintiff's assignor in obtaining the advances on the shipments by the first two vessels, then the defendant, on learning of the fraud was justified in rescinding the contract of February 8th, 1876, and in refusing to make any further advance.

(The presiding judge refused so to charge, to which refusal, the plaintiff in error duly excepted).

The plaintiff in error asked the Court to charge, that if the jury find on the evidence of Mr. Edye, and other evidence in the case, that the lard was not in the defendant's possession or control, then he is not liable to an action for the conversion of the same.

(The presiding judge refused so to charge, to which refusal, the plaintiff in error duly excepted).

The plaintiff in error asked the Court to charge, that if the jury find that on the 8th of April, 1876, Mr. Maziere learned that the plaintiff's assignors had practiced a fraud on defendant, by obtaining advances on watered lard, by means of false samples of pure lard, and that he communicated such information to the defendant, and that the defendant on the 10th of April, refused to make any advance, because Wilson had swindled him and the lard was watered, but offered to return the receipts for the shipment then on

board the Auguste Andre, then the verdict must be for the defendant.

(The presiding judge refused so to charge, to which refusal, the plaintiff in error duly excepted).

The plaintiff in error asked the Court to charge that if the jury find that the infant, Odell Wilson, was a minor at the time of the transaction, and rescinded the contract, by setting up his infancy as a defense to defendant's suit to recover his advances, then the jury may find that there was no legal assignment of the claim to the plaintiff, and that the plaintiff is not entitled to maintain this action.

(The presiding judge refused so to charge, to which refusal, the plaintiff in error duly excepted).

The plaintiff in error asked the Court to charge that, as the firm of Wilson & Son, consisted of Riley P. Wilson and his son, a minor, no valid assignment to the plaintiff of the claim has been proved, and their verbal assignment gave no title to the claim in suit.

(The presiding judge refused so to charge, to which refusal the plaintiff in error duly excepted).

The plaintiff in error requested the Court to charge that the defendant never had any title to the 135 tierces, that plaintiff's remedy was against the carriers with whom he had deposited the lard. The defendant was not in possession of the lard, and could not be liable on demand and refusal.

(The presiding judge refused so to charge; to which refusal the plaintiff in error duly excepted.)

The plaintiff in error requested the Court to charge, that there is no evidence of a conversion of the lard by the defendant. A conversion implies a wrongful dis

position or a wrongful withholding of the property. The defendant never was in possession of this lard.

(The presiding judge refused so to charge; to which refusal the plaintiff in error duly excepted.)

The plaintiff in error requested the Court to charge that defendant agreed to advance on whatever quantity of refined lard Wilson might consign through him for shipment to his friends in Europe, advances to be made after the goods are shipped, and on presentation of the ship's receipts, and proper weigh master's returns. Wilson shipped the goods himself on the Auguste Andre to defendant's friends, Nottebohm Brothers. The goods were not in defendant's possession or control, and he is not liable to an action for their conversion. The only action he has made himself liable to, is an action for the breach of the agreement to advance, that is not this action. The goods were in the possession of the carriers en route to Brothers Nottebohm. The defendant did not withhold the lard. He has done no wrongful act, and made no wrongful disposition of it. Plaintiff has mistaken his remedy, and defendant is entitled to a verdict.

(The presiding judge refused so to charge; and plaintiff in error duly excepted.)

The plaintiff in error requested the Court to charge that if defendant did nothing with this lard, Wilson put it on board the Auguste Andre himself, April 8th; the steamer remained at her docks in Jersey City for a week after. Why did he not replevin it or demand it of the ship. She did not clear till the afternoon of the 15th or sail till the 16th, and plaintiff might have

bronght an action to try the title or right to the possession of this lard against the carriers or Brothers Notte bohm, but not against the defendant.

(The presiding judge refused so to charge, to which refusal the plaintiff in error duly excepted).

The plaintiff in error requested the Court to charge the jury, that the watering of lard is an adulteration and a fraud, that plaintiff cannot recover for the water in the lard, but only for the lard delivered on the Auguste Andre; and that if the jury find that defendant advanced on the lard shipped March 16th, 23rd and 29th, on more lard than was in the shipment, by reason of the water in it, then for the excess there was a lien on the 135 tierces shipped on the same vessel April 8th, and plaintiff's assignors not having tendered such over advances plaintiff is not entitled to maintain this action, but the verdict must be for defendant.

(The presiding judge refused so to charge, to which refusal the plaintiff in error duly excepted).

The Court instructed the jury that it was the right of Wilson & Son, to insist upon the payment of the advance; that the payment of the advance was the condition of the delivery of the lard, that if at that time the defendant refused to pay, he acquired no right to the possession of the lard, that it was not necessary to take into consideration the motives which influenced either party. Some allegations have been made here against the good faith of the defendant. The question of his good faith in the transaction, has not been fully tried, because it has been my view that the rights of the parties were to be determined by the applica-

tion of very well settled rules of law, which render it quite immaterial, whether the defendant was acting in good faith or not; quite immaterial whether the lard which had been delivered before the 8th of April, was such as he was entitled to have under his agreement with Wilson & Son, or was not. The plaintiff had the right to adopt the form of action which he has adopted. He had the right to insist that until this contract was complied with, the defendant acquired no interest whatever, in the lard, which had been delivered to the ship. He has taken that position, and if you find the facts to be as I have detailed them, and there is no conflict practically upon the evidence, then the plaintiff is entitled to recover; that upon the evidence in this case the only question for you to consider, is the question of damages, that you are to exclude from consideration, the testimony of the chemist, as to the amount of water, the extent of the adulteration of the lard, and that is for the reason there is not competent evidence in the case to show, that the samples analyzed by the chemist, were samples taken from these 135 tierces of lard. In all probability, the samples were taken from the lard then on board the ship, but whether from the 135 tiers or not, we do not know. Therefore it will be your duty to disregard the analysis of the chemist in your consideration of the quality of the lard. To these several propositions the plaintiff in error excepted (fol. 259).

The jury found a verdict for the plaintiff for $713.10, and the defendant took this writ of error, and the Court settled and signed a bill of exceptions.

ASSIGNMENT OF ERRORS.

It is assigned for error by the plaintiff in error.

1st. Assignment of error. That the plaintiff in error being before, at the time of the commencement of this suit, and ever since Consul of the Kingdoms of Norway and Sweden, he ought not, according to the constitution and laws of the United States, to have been impleaded in the Circuit Court, but in the District Court of the United States, for the Southern District of New York, or in some of the District Courts, and that the Circuit Court had not jurisdiction of this cause and should have directed a verdict for said defendant.

2d. Assignment of error. That judgment was given for the defendant in error against the plaintiff in error, when by the laws of the United States, the judgment ought to have been given for the plaintiff in error against the defendant in error, it being admitted that the plaintiff in error was, at the time of the transaction on the 8th of April, and continued to the trial, the Consul for Sweden and Norway, at the Port of New York, whereby the Circuit Court had no jurisdiction of the cause.

3d. Assignment of error. That the Judge who tried the cause, erroneously excluded on the trial, relevant, material and competent evidence offered by the plaintiff in error on the cross-examination of Riley P. Wilson, whereas he should have admitted such evidence.

4th. That the said Judge erroneously excluded on such trial, relevant, material and competent evidence offered by the plaintiff in error on the cross-examination of William I. Preston, whereas he should have admitted the same.

5th. That the said Judge erroneously excluded on such trial, relevant, material and competent evidence offered by the plaintiff in error, on the examination of Auguste Walther, whereas he should have admitted the same.

6th. That the said Judge erroneously excluded on such trial, relevant, material and competent evidence offered by the plaintiff in error on the examination of Nicholas Brandt, whereas he should have admitted the same.

7th. That the said Judge erroneously excluded on such trial, relevant, material and competent evidence offered by the plaintiff in error, in striking out the 6th, 7th, 9th and 10th interrogatories to the commission to Antwerp, whereas he should have admitted the answers of August Nottebohm to such interrogatories.

8th. That the said Judge erroneously excluded on such trial the telegram of April 8th, 1876, so far as it relates to the lard shipped before the 8th of April, whereas he should have admitted such telegram.

9th. That the said Judge erroneously excluded on such trial, relevant, material and competent evidence offered by the plaintiff in error, on the examination of Charles M. Stilwell, whereas he should have admitted the same.

10th. That the said judge erroneously excluded on such trial relevant, material, and competent evidence offered by the plaintiff in error, on the examination of Martin Rouse, whereas he should have admitted such evidence.

11th. That the said judge erroneously excluded on such trial, relevant, material, and competent evidence offered by the plaintiff in error, on the examination of Henry DeMaziere, whereas he should have admitted such evidence.

12th. That the said judge erroneously refused to charge the jury on such trial, as requested by the plaintiff in error, that if the jury find that, upon the shipment to the consignment of Brothers Nottlebohm, at Antwerp, of 100 tierces by the Auguste Andre, of February 16th, arriving at Antwerp, March 5th, 1876, or of 242 tierces by the C. F. Funch, March 2nd, and 6th, arriving at Antwerp, March 23rd, plaintiffs assignors, by a false sample, obtained from the defendant the advances he made on such consignment, and that the defendant learned on the 8th of April, 1876, of the fraud practiced on him, and that the lard shipped was not pure refined lard, according to the sample presented by Wilson to obtain the advance, but adulterated with water, then the defendant was justified in the course taken on the 8th and 10th of April, and the verdict should be for the defendant, whereas he should have charged such jury in accordance with such request.

13th. That the said judge erroneously refused to charge the jury on such trial as requested by the plaintiff in error, that if the jury find that fraud was practiced by the plaintiff's assignors, in obtaining the advances on the shipments by the first two vessels, then the defendant on learning of the fraud was justified in rescinding the contract of February 8th, 1876, and in refusing to make any further advance, whereas he should have charged such jury in accordance with such request.

14th. That the said judge erroneously refused to charge the jury on such trial as requested by the plaintiff in error, that if the jury find on the evidence of Mr. Edye, and other evidence in the case, that the lard was not in the defendant's possession or control, then he is not liable to an action for the conversion of the same, whereas he should have charged such jury in accordance with such repuest.

15th. That the said judge erroneously refused to charge the jury on such trial, as requested by the plaintiff in error, that if the jury find that on the 8th of April, 1876, Mr. Maziere learned that the plaintiff's assignors had practised a fraud on defendant by obtaining advances on watered lard by means of false samples of pure lard, and that he communicated such information to the defendant, and that the defendant on the 10th day of April, refused to make any advance because Wilson had swindled him, and the lard was watered, but offered to return the receipts for the shipment then on board the Auguste Andre, then the verdict must be for the defendant, whereas he should have charged such jury in accordance with such request.

16th. That the said Judge erroneously refused to charge the jury on such trial as requested by the plaintiff in error, that if the jury find that the infant Odell Wilson, was a minor at the time of the transaction, and rescinded the contract by setting up his infancy as a defence to defendant's suit to recover his advances, then the jury may find that there was no legal assignment of the claim to the plaintiff, and that the plaintiff is not entitled to maintain this action, whereas he

should have charged such jury in accordance with such request.

17th. That the said Judge erroneously refused to charge the jury on such trial, as requested by the plaintiff in error, that as the firm of Wilson & Son consisted of Riley P. Wilson and his son, a minor, no valid assignment to the plaintiff of the claim has been proved, and their verbal assignment gave no title to the claim in suit, whereas he should have charged such jury in accordance with such request.

18th. That the said Judge erroneously refused to charge the jury on such trial, as requested by the plaintiff in error, that the defendant never had any title to the 135 tierces; that plaintiff's remedy was against the carriers with whom he had deposited the lard; that the defendant was not in possession of the lard and could not be liable on a demand and refusal, whereas he should have charged such jury in accordance with such request.

19th. That the said Judge erroneously refused to charge the jury on such trial, as requested by the plaintiff in error, that there is no evidence of a conversion of the lard by the defendant; that a conversion implies a wrongful disposition or a wrongful withholding of the property; that the defendant never was in possession of this lard, whereas he should have charged such jury in accordance with such request.

20th. That the said judge erroneously refused to charge the jury on such trial as requested by the plaintiff in error, that defendant agreed to advance on whatever quantity of refined lard Wilson might consign through him for shipment to his friends in Europe, advances to be made after the goods are shipped and on presentation of the ship's receipts and proper weighmaster's returns; that Wilson shipped the goods himself on the Auguste Andre to defendant's friends, Nottebohm Brothers; that the goods were not in defendant's possession or control, and he is not liable to an action for their conversion; that the only action he has made himself liable to, is an action for breach of the agreement to advance, that is not this action; that the goods were in possession of the

carriers en route to Brothers Nottebohm; that the defendant did not withhold the lard; that he has done no wrongful act, and made no wrongful disposition of it; that plaintiff has mistaken his remedy, and defendant is entitled to a verdict, whereas he should have charged such jury in accordance with such requests.

21st. That the said Judge erroneously refused to charge the jury on such trial, as requested by the plaintiff in error, that if defendant did nothing with this lard, Wilson put it on board the Auguste Andre himself, April 8th, the steamer remained at her dock in Jersey City for a week after, why did he not replevin it or demand it of the ship. She did not clear till the afternoon of the 15th, or sail till the 16th, and plaintiff might have brought an action to try the title or right to the possession of this lard, against the carriers or Brothers Nottebohm, but not against the defendant; whereas he should have charged such jury in accordance with such request.

22nd. That the said Judge erroneously refused to charge the jury on such trial as requested by the plaintiff, in error that the watering of lard is an adulteration and a fraud; that plaintiff cannot recover for the water in the lard, but only for the lard delivered on the Auguste Andre, and that if the jury find that defendant advanced on the lard shipped March 16th, 23d, and 29th, on more lard than was in the shipment, by reason of the water in it, then, for the excess there was a lien on the 135 tierces shipped on the same vessel, April 8th, and plaintiff's assignors, not having tendered such over-advances, is not entitled to maintain this action, but the verdict must be for defendant, whereas, he should have charged such jury in accordance with such request.

23d. Assignment of error. That the said Judge erroneously charged the jury contrary to law under the facts in the case, whereas he should not have so charged, as appears by the exceptions contained in the bill of exceptions and record herein.

First Point. The defendant being before, at the time of the commencement of this suit, and ever since Consul of the Kingdoms of Norway aad Sweden, ought not according to the Constitution and Laws of the United States, to have been impleaded in the Circuit Court, but in the District Court of the United States for the Southern District of New York, or in some other District Court, and the Circuit Court had no jurisdiction of the cause, and should have directed a verdict for said defendant.

The Constitution of the United States declares "The "judicial power of the United States, shall be vested in one "Supreme Court, and in such inferior Courts as the Con- "gress may from time to time ordain and establish," (Article III, § 1) * * * * * *

"The judicial power shall extend. * * * * * to all cases affecting * * * * * Consuls" (Article III, § 2).

The Revised Statutes of the United States, enact "§ 563 "The District Courts shall have jurisdiction as follows: " * * * * * *

"Seventeenth. Of all suits against Consuls or vice Con- "suls except for offenses above the description aforesaid."

§ 629 of the Revised Statutes of the United States which defines the jurisdiction of the Circuit Courts, does not confer any jurisdiction in actions against Consuls.

See all act of March 3rd, 1875.

The jurisdictiou of the District Court was therefore exclusive.

Davis *vs.* Packer, 6 Peters, 41.
Davis *vs.* Packer, 7 Peters, 276.
Capron *vs.* Van Noorden, 2 Cranch, 126.
Jackson *vs.* Ashton, 8 Peters, 148.
Piquignot *vs.* The Pennsylvania R. R. Co., 16 How. U. S. Rep., 104.
Van Antwerp *vs.* Hulburd, 7 Blatch., 426.
Valario *vs.* Thompson, 7.N. Y., 576.
Naylor *vs.* Hoffman, 22 How. Pr., 510.

The proper way to raise this question of jurisdiction is by writ of error.

Mr. Justice Woodbury, in delivering the opinion of this Court, in the Bank of the United States against Moss, reported in 6 How. U. S. Rep. at page 39, says: "The only "relief for errors in law, in such cases is usually by new trial, "review, writ of error or appeal as either may be appropri- "ate and allowable by law."

Second Point. Trover was not properly brought. The agreement was to advance on whatever quantity of refined lard not less than 100 tierces at a time, O. Wilson & Son might consign for shipment to Brothers Nottebohm at Antwerp, "*advances to be made after the goods "are shipped*," and on presentation of the ships receipts and proper weigh masters returns. Accordingly O. Wilson & Son shipped the 135 tierces by the Auguste Andre to Nottebohm Brothers at Antwerp, being by the same vessel and voyage on which the 394 tierces put on board March 16th, 23d and 29th were to be transported. This put the title of the 135 tierces of lard in Nottebohm Brothers and the possession of the same in the ship Auguste Andre. The agreement of the plaintiff in error was only to advance *after the goods are shipped* and on presentation of the ships receipts and proper weigh master's returns. He had no control over the lard, no bills of lading were issued to him; this was established by Mr. Edye evidence who was called by the defendant in error, (folio 144, 146.) In answer to a question by the Court, he testified that he should not part with the lard, and to Mr. Forster, not under any circumstances, unless compelled by course of law. He would not have given it up at all even if a receipt was surrendered to him, (fol. 147.) The Auguste Andre cleared at the Custom House April 15th, (fol. 178,) and she sailed at 2 o'clock in the afternoon of Saturday, April 15th, 1876, (fol. 187.)

There was ample time for the assertion of such rights as Wilson & Son or Preston might have had. They might

have replevined the lard from the ship-owner or from Brothers Nottebohm, to whom they had consigned it, but having consigned it to Nottebohm at Antwerp, and shipped it on the Auguste Andre, on an agreement by Bors to advance on evidence that it had been received on board the ship and what it weighed, their only remedy against Bors was on the agreement to advance, for his refusal to advance. The learning of the fraud practiced in former shipments on which he had advanced entitled plaintiff in error to decline then to advance on further shipments until he had the samples of the 135 tierces on the Auguste Andre examined, and when the result of such examination by Mr. Walther, Mr. Stillwell's concern and Mr. Maziere showed that those samples were also watered certainly no action for the advance could have been maintained. The fraudulent adulteration would have been a complete defense. The offer to return the receipts was all or more than he was called on to do. The Court clearly was in error in not submitting that question to the jury as requested, and if the jury had found that he refused to advance because Wilson had swindled him and the lard was watered, but offered to return the receipts for the shipment then on board the Auguste Andre, certainly the verdict should have been for him. Fraud vitiates all contracts into which it enters and renders them void. An action for the advance could not be successfully maintained with the fraud proven. Fraud could have been given in evidence as a defense, and would have been an answer to the whole demand for an advance or in abatement of the damages according to the circumstances, and in an action for the advance, if form controlled, would be competent proof under the general denial.

The Court at the trial sought to avoid this by what it charged the jury as to the form of the action. At the time of the trial the law of New York was contained in what was known as the Code of Procedure, entitled "An Act to simplify the practice, pleadings and proceedings in the Courts of this State," the preamble of which recites that "Whereas, it is expedient that the present forms of actions and

" pleadings in cases at Common Law should be abolished ; " that the distinction between legal and equitable remedies " should no longer continue, and that an uniform course of " proceedings, in all cases, should be established ;" and enacted in section 149, that " the answer of the defendant " must contain,

" 1. A general or specific denial of each material allega- " tion of the complaint controverted by the defendant, or of " any knowledge or information thereof sufficient to form a " belief ; 2. A statement of any new matter constituting a " defence or counter-claim, in ordinary and concise lan- " guage, without repetition," and in section 150, that " the " counter claim mentioned in the last section must be one " existing in favor of a defendant, and against a plaintiff, " between whom a several judgment might be had in the ac- " tion, and arising out of one of the following causes of ac- " tion.

" 1. A cause of action arising out of the contract or trans- " action set forth in the complaint as the foundation of the " plaintiff's claim, or connected with the subject of the ac- " tion ;

" 2. In an action arising on contract, any other cause of " action arising also on contract, and existing at the com- " mencement of the action.

" The defendant may set forth by answer, as many defences " and counter claims as he may have, whether they be such " as have been heretofore denominated legal or equitable, or " both. They must each be separately stated, and refer to " the causes of action which they are intended to answer, in " such manner that they may be intelligibly distinguished." And in section 153, that " when the answer contains new mat- " ter constituting a counter claim, the plaintiff may, within " twenty days, reply to such new matter, denying generally " or specifically each allegation controverted by him, or any " knowledge or information thereof, sufficient to form a be- " lief ; and he may allege in ordinary and concise language, " without repetition, any new matter not inconsistent with

" the complaint, constituting a defence to such new matter " in the answer, and the plaintiff may in all cases demur to " an answer containing new matter, where, upon its face, it " does not constitute a counter claim or defence ; and the " plaintiff may demur to one or more of such defences or " counter claims, and reply to the residue of the counter " claims."

Section 914, of the Revised Statutes in force when this cause was tried enacted that, " The practice, pleadings, and " forms, and modes of proceedings in civil causes, other than " equity and admiralty causes in the Circuit and District " Courts, shall conform, as near as may be, to the practice, " pleadings, and forms, and modes of proceeding existing at " the time in like causes in the Courts of Record of the State " within which such Circuit or District Courts are held, any " rule of court to the contrary, notwithstanding."

This is a valid Statute U. S. vs. Council of Keokuk, 6 Wallace 514

Blease vs Garlington, 92, U. S. 8.

The pleadings in this case were under this Statute. The first pleading was not a declaration in trover, but a complaint, alleging that Wilson & Son were the owners of and entitled to the possession of the lard, that the Consul fraudulently obtained possession of said goods and unlawfully converted and disposed of them to his own use, and that on the 11th of April, 1876, Wilson & Son assigned their claim to Preston; there was then an answer containing a denial, affirmative defences and a counterclaim, and there was a reply to the counterclaim. The proof of plaintiff below failed to establish the allegations of the complaint, except that Mr. Bors was the Swedish and Norwegian Consul, which ousted the Court of jurisdiction of the case, and the court excluded all evidence in support of the answer, except so far as it related to the 135 tierces of lard under the view that the old form and technicality of the action of trover was applicable to the case; but even were this such an action the refusal of Mr. Bors to advance and his offer to return the receipts for

the shipments could not make him liable for a conversion. The existence of a contradiction in the evidence of Preston, Wilson and Maziere does not cure the error, because the court by refusing to charge that if defendant offered to return the receipts for the shipments, then on board the Auguste Andre, then the verdict should be for the defendant, took the question from the jury which was error.

Third Point. The Court below erred in excluding the evidence offered by the defence as to the 394 tierces on the Auguste Andre and in taking the questions in respect thereto from the jury. If a prima facie case had been shown by plaintiff when he rested, defendant was entitled to disprove such case. The Court and jury had only heard Wilson's version of the transactions attending the several consignments of lard under the agreement of February 8th. The defence had a right to show the action of Wilson & Son justifying a rescission of the agreement. The case was one of the grossest fraud and false samples on the part of Wilson & Son in obtaining the prior advances. The defence was certainly entitled to show the water in the lard manufactured by Wilson & Son in disproof of his right to the advance and in support of the right of Mr. Bors to refuse any further advance. If he succeeded in proving such adulteration he would have established that Wilson & Son got possession of the prior advances by the grossest of fraud or deceit, such evidence, if admitted and believed by the jury, would deprive Wilson & Son of all pretense of right or have lawful claim to any further advance under the agreement. They could not recover on such agreement if the lard was watered fraudulently or feloniously so that the false samples would deceive Mr. Bors. The proof given by the defense and offered cer. tainly showed enough to establish a right to rescind the agreement and a rescission in fact by the refusal to make any further advance.

Cummings vs Perham, 1 Metc. 555.
Michaels vs Michaels, N. Y., 267, 273.

The Court therefore erred in the charge that it was the right of Wilson & Son to insist upon the payment of the

advance or that the payment of his advance was the condition of the delivery of the lard, and the exception thereto was well taken. On the the advance was not to be made till after the goods were shipped and that was only to be made on "refined lard," not on adulterated or watered lard.

Fourth Point. The assignment by Wilson & Son, one of the firm being an infant, to Preston, as a creditor, was void. The interest of the infant did not pass by the assignment. He did not execute it. He, at most, only stood by. He is not estopped. The assignee took no title to the claim. He had full notice of the situation of the matter. He was advised of the refusal of Mr. Bors to advance and the grounds of such refusal before, as he says, he bought the right of action. What took place was not sufficient to entitle him to maintain this action in the Circuit Court.

Fifth Point. The exclusion of what was sought to be elicited on the cross-examination of Wilson was improper. His former fraudulent transactions were certainly admissable on the question of intent. Whether and when he saw Mr. Bors was a proper cross-examation, The cross. examination of Preston was improperly restricted. His early relations to this lard as well as to Wilson should have been admitted in view of the third defence, and the conceded fact that he received all the checks advanced, and that his clerks may have carried all the papers to Mr. Bors; when the defence is fraud great latitude is allowed as to proof. It was a good defense to Wilson & Sons right to the advances that they sought to obtain them by fraud or fraudulent samples of the lard.

Dobson vs. Pearce, 12 N. Y., 156.

Warner vs. Blakeman, 4 Keyes, 487.
Annett vs. Terry, 35 N. Y., 256.

In Warner vs. Blakeman (supra), Mr. Justice Woodruff says; "It is the just and proper pride of our matured "system of equity jurisprudence that fraud vitiates every "transaction, and however men may surround it with forms, "solemn instruments, proceedings conforming to all the de- "tails required in the laws, or even by the formal judgment "of Courts, a Court of Equity will disregard them all if "necessary, that justice and equity may prevail."

Under the Code of New York (§ 69), abolishing distinctions between actions at law and suits in equity, and (§ 150), authorizing any defense, whether legal or equitable, to be interposed, a defendant in an action on a judgment may have affirmative relief against it, on facts which formerly would authorize relief on a bill in equity.

Dobson vs. Pearce, 12 N. Y., 156, 168.

In Dobson vs. Pearce (12 N. Y., 165), Mr. Justice W. F. Allen, in delivering the opinion of the Court said: "Fraud "and imposition invalidate a judgment as they do all acts, "and it is not without semblance of authority that it has "been suggested that at law the fraud may be alleged when- "ever a party seeks to avail himself of the results of his own "fraudulent conduct by setting up a judgment, the fruits of "his fraud (referring to Borden vs. Fitch, 15 Johns., 151, "and cases there cited). But whether this be so or not, at "law, it is unquestionable that a Court of Chancery "has power to grant relief against judgments, when "obtained by fraud. Any fact which clearly proves "it to be against conscience to execute a judgment, and "of which the injured party could not avail himself at law, "but was prevented by fraud or accident, unmixed with any "fault or negligence in himself or his agents, will justify "an interference by a Court of Equity." And then proceeded to show that under the Code, the defendant may

set up and prove as a defence, any facts or circumstances which would entitle him to relief in equity.

Courts have never laid down in a general proposition an accurate definition or discription of actual fraud, nor any general rule by which they are to be controlled in giving relief.

In Lawley vs. Hooper, 3 Atk., 279, Lord Hardwicke, in speaking of fraud, said: "The Court very wisely hath never "laid down any general rule beyond which it will not go "lest other means of avoiding the equity of the Court "should be found out; therefore, they always determine "upon the particular circumstances of each case, and wher-"ever they have found the least tincture in any oppressive "bargain (or proceeding) relief hath been given."

Lord Eldon in Marlock vs. Butler, 10 Ves. Jr., 306, said: "The Court has never ventured to lay down as a general "proposition, what shall constitute fraud".

Lord Hardwicke, in a letter to Lord Karnes, June 30th, 1759, said: "Fraud is infinite, and were Courts of Equity "once to lay down rules how far they would go, and no "further, in extending relief against it, or to define strictly, "the species or evidence of it, the jurisdiction would be "cramped, or prevented, or perpetually eluded by new "schemes which the fertility of man's invention would con-"trive."

Park's History of Chancery, 508.

Mr. Justice Story, in his Equity Jurisprudence (1 Story Eq. §187). while disclaiming an intention to give a definition of fraud, to be adhered to in all cases, says: "Fraud, "indeed, in the sense of a Court of Equity, properly includes "all acts, omissions and concealments which involve a "breach of legal or equitable duty, trust or confidence "justly reposed, and are injurious to another, or by which "an undue and unconscientious advantage is taken of "another."

This seems to be the most comprehensive definition that we have been able to find.

To illustrate the principal upon which Courts have acted

Warner vs. Blakeman, 4 Keyes, 487.
Annett vs. Terry, 35 N. Y., 256.

In Warner vs. Blakeman (supra), Mr. Justice Woodruff says; "It is the just and proper pride of our matured "system of equity jurisprudence that fraud vitiates every "transaction, and however men may surround it with forms, "solemn instruments, proceedings conforming to all the de- "tails required in the laws, or even by the formal judgment "of Courts, a Court of Equity will disregard them all if "necessary, that justice and equity may prevail."

Under the Code of New York (§ 69), abolishing distinctions between actions at law and suits in equity, and (§ 150), authorizing any defense, whether legal or equitable, to be interposed, a defendant in an action on a judgment may have affirmative relief against it, on facts which formerly would authorize relief on a bill in equity.

Dobson vs. Pearce, 12 N. Y., 156, 168.

In Dobson vs. Pearce (12 N. Y., 165), Mr. Justice W. F. Allen, in delivering the opinion of the Court said: "Fraud "and imposition invalidate a judgment as they do all acts, "and it is not without semblance of authority that it has "been suggested that at law the fraud may be alleged when- "ever a party seeks to avail himself of the results of his own "fraudulent conduct by setting up a judgment, the fruits of "his fraud (referring to Borden vs. Fitch, 15 Johns., 151, "and cases there cited). But whether this be so or not, at "law, it is unquestionable that a Court of Chancery "has power to grant relief against judgments, when "obtained by fraud. Any fact which clearly proves "it to be against conscience to execute a judgment, and "of which the injured party could not avail himself at law, "but was prevented by fraud or accident, unmixed with any "fault or negligence in himself or his agents, will justify "an interference by a Court of Equity." And then proceeded to show that under the Code, the defendant may

set up and prove as a defence, any facts or circumstances which would entitle him to relief in equity.

Courts have never laid down in a general proposition an accurate definition or discription of actual fraud, nor any general rule by which they are to be controlled in giving relief.

In Lawley vs. Hooper, 3 Atk., 279, Lord Hardwicke, in speaking of fraud, said: " The Court very wisely hath never " laid down any general rule beyond which it will not go " lest other means of avoiding the equity of the Court " should be found out; therefore, they always determine " upon the particular circumstances of each case, and wher- " ever they have found the least tincture in any oppressive " bargain (or proceeding) relief hath been given."

Lord Eldon in Marlock vs. Butler, 10 Ves. Jr., 306, said: " The Court has never ventured to lay down as a general " proposition, what shall constitute fraud".

Lord Hardwicke, in a letter to Lord Karnes, June 30th, 1759, said: "Fraud is infinite, and were Courts of Equity " once to lay down rules how far they would go, and no " further, in extending relief against it, or to define strictly, " the species or evidence of it, the jurisdiction would be " cramped, or prevented, or perpetually eluded by new " schemes which the fertility of man's invention would con- " trive."

Park's History of Chancery, 508.

Mr. Justice Story, in his Equity Jurisprudence (1 Story Eq. §187). while disclaiming an intention to give a definition of fraud, to be adhered to in all cases, says: " Fraud, " indeed, in the sense of a Court of Equity, properly includes " all acts, omissions and concealments which involve a " breach of legal or equitable duty, trust or confidence " justly reposed, and are injurious to another, or by which " an undue and unconscientious advantage is taken of " another."

This seems to be the most comprehensive definition that we have been able to find.

To illustrate the principal upon which Courts have acted

in giving relief against fraud, whether actual or constructive, we enumerate a few cases, some of which prove that even judgments or decrees are not safe when fraud underlies them.

Buckley vs. Starr, 2 Day, (Conn.) 553.
Van Cortlandt vs, Underhill, 17 Johns, 405.
Bateman vs. Willoe, 1 Sch. and Lefr. 205.
Thompson vs. Graham, 1 Paige, 384.
Apthorpe vs. Comstock, Hopk. 143.
Reigal vs. Wood, 1 Johns Ch. 402.

In Marine Insurance Company vs. Hodson, 7 Cranch. 332 Marshall, Ch. J. lays it down as a general rule, that any facts which clearly prove it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a Court of law, or had no oppurtunity to defend, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself, will justify an application to a Court of Chancery, and will be relieved against.

Carmeal vs. Wilson, 3 Litt. 80.
Countess of Gainsborough vs. Gifford, 2 P. Wins., 424.
Northrop vs. Lane, 3 Des. 323.
Stowell vs. Eldred. 26 Wis. 504.
Plagram vs. King, 2 Hawks. 405.
Borden vs. Fitch, 15 Johns. 21. 3 Graham and W. on New Trials, 1542-3.

Sixth Point. The rulings of the Court below are a violation of the elementary rule that the law will never lend itsaid to a party to a fraud to enforce an executory contract. The maxim in pari delicto potior est conditio, defendentis is an illustration trite and familiar of how far this rule extends n the case of executed contracts. The effort of the plain-

tiff here was to enforce an advance on watered lard, which is a fraudulent adulteration. Mr Bors promptly disaffirmed the contract at the earliest practical moment after the discovery, and he also offered to return the receipts he had received under it, and to restore the party to the condition in which he stood before. He in no way ratified the agreement after notice of the fraud. He had made no admission to preclude him from setting up the title of Nettebohm Brothers or the right of posession in the Auguste Andre to the lard which even in the technical action of trover was the right of the defendant unless he had precluded himself from setting up property in a third person.

Fontaine vs. Phenix Ins. Co., 11 John 300. In trover defendant can set up fraud of the plaintiff. Rotan v. Fletcher, 15 Johns 207, 8, or the plaintiff's acts by which he has divested himself of the property, Peirrepont vs. Barnard 2 Selden 279, as here by placing the lard on the Auguste Andre and consigning it to Nettebohm Brothers, at Antwerp. Davis vs. Hypoch, 6 Duer 254.

The * * * * assignments of error are enough to reverse this judgment.

Seventh Point. The Court erred in the exclusion of evidence offered to sustain the defence in the limited range which the rulings left the defence, confining them to the 135 tierces, notably in the direction to the jury to exclude from their consideration the testimony of the chemist as to the amount of water. The chemist testified to the samples, (Nos. 1, 2, and 3, fol. 185, 186.) Chemist's report on the samples, left Ex. G, (fol. 64. (Mr. Maziere brought the samples up stairs and saw the chemist himself and knew from the information of the Inspector who took them, that they were samples of the 135 tierces, (fol. 223.) The entries proved by Mr. Rouse and and read showed that they were samples of the 135 tierces fol. 238 and 241. Martin Rouse sent Billy over to get the samples, and

took them to the office of Christian Bors and delivered them to Mr. Maziere, (fol. 191, 193. Wilson proved that Billy took the samples and that he saw them at Mr. Bors' office, (fol. 72.) He also testified that Billy took the sample of the 135 tierces, (fol. 98.) He knew their inspection was made of the 135 tierces, (fol. 100.) Billy took samples for Rouse, Goullard & Co., (fol. 148,) who also weighed the lard for him, (fol. 111.) Billy McGovern, who did the sampling, was ill and had been for three years, (fol. 188) at the Hospital known as the Old Mens' Home (Fol. 135).

This was suflcient evidence to go to the jury on the question, and the Court erred in excluding the evidence from their consideration, so far as it was admitted and in the case.

Eighth Point. For the error assignee the judgment should be reversed.

GEORGE H. FORSTER,
Of Counsel for Plaintiff in Error.

111-252

111-252

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 178.

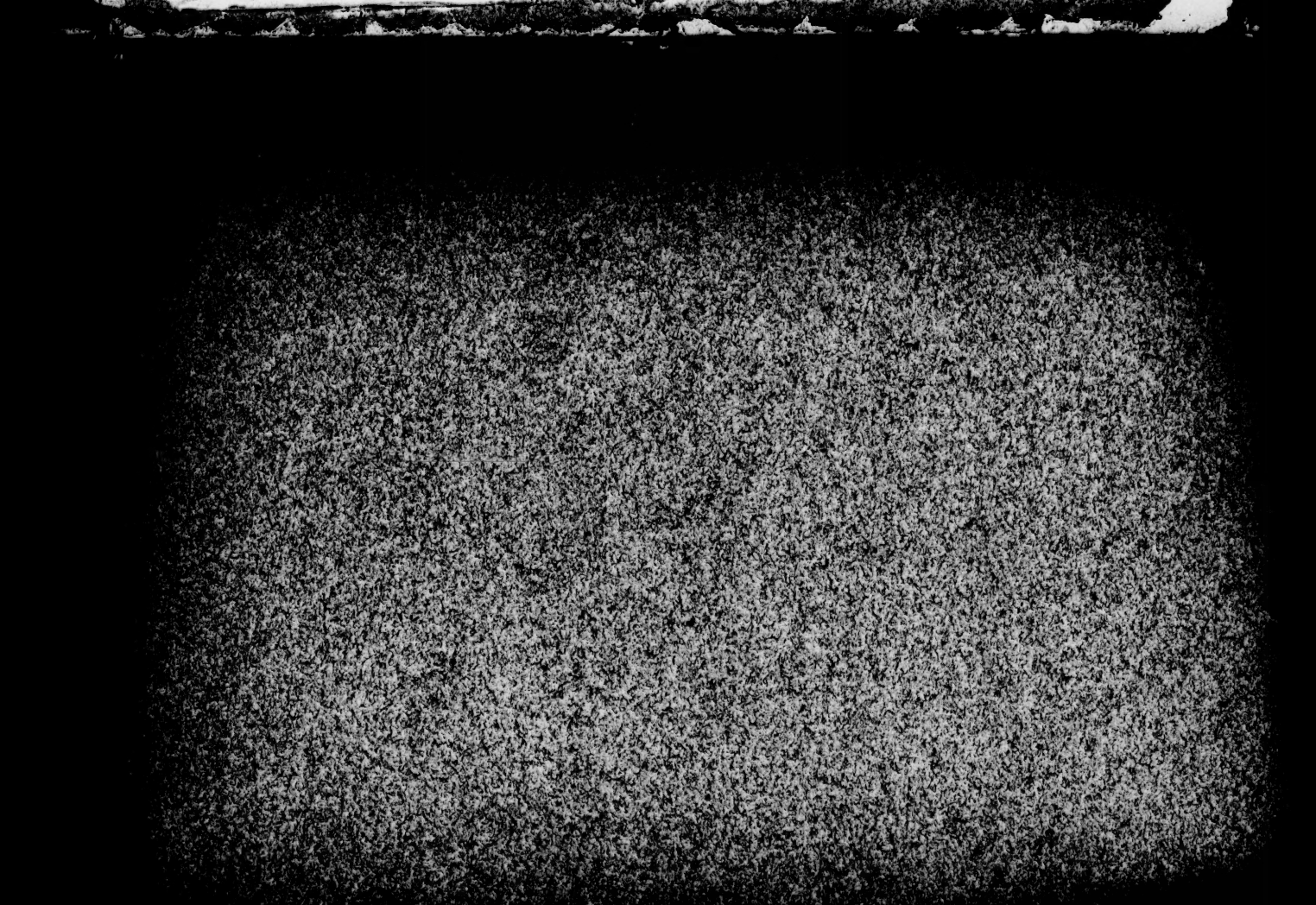
CHRISTIAN BORS, Consul for the Kingdom of Norway and Sweden,
Plaintiff in error,

vs.

WILLIAM I. PRESTON.
Defendant in error.

BRIEF FOR DEFENDANT IN ERROR.

B. F. TRACY,
OF COUNSEL.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1883—No. 178.

CHRISTIAN BORS,
Plaintiff in Error,
vs.
WILLIAM I. PRESTON,
Defendant in Error.

Brief for Defendant in Error.

In Error to the Circuit Court of the United States, for the Southern District of New York.

STATEMENT OF FACTS.

This action was brought in the Circuit Court of the United States, for the Southern District of New York, by the defendant in error, against the plaintiff in error, to recover for the conversion of 135 tierces of lard. The claim upon which the action was brought was assigned by Wilson & Son to the defendant in error. Wilson & Son, refiners of lard in the City of New York, on the 8th day of February, 1876, entered into the following agreement with Bors:

" *To Messrs. Wilson & Son,*

" February 8th.

" MEMORANDUM FROM CHRISTIAN BORS, 18 EXCHANGE PLACE.

" I herewith agree to advance you until further " notice on whatever quantity of refined lard, not " less than one hundred tierces at a time, you " may consign through me, for shipment to my " friends in Europe, at the rate of one cent less than " western lard is selling, advances to be made " after the goods are shipped, and on presentation " of the ship's receipts and proper weighmaster's " returns.

" CHRISTIAN BORS."

Pursuant to this agreement, Wilson & Son delivered on the dock of "Antwerp Steamships" in Jersey City from time to time quantities of lard in lots of not less than 100 tierces, and took ship's receipts in the following form:

("Funch & Edye & Co.'s, pier alongside Pavonia Ferry, Jersey City.")

Received in good order and condition on dock for steamship August Andre, from Christian Bors.

Marks, numbers, packages, contents, W. (135) one hundred and thirty-five tierces lard.

Jersey City, April 8th, 1876.

G. LUCEY,
Dock Clerk.

He took the ship's receipts and weighmaster's returns for the lard, and presenting these to Bors, at his office in New York City, received his advances on each separate lot as delivered as per agreement.

This was the course of business which was pursued from the date of the contract down to the 8th day of April, when the 135 tierces of lard in question were delivered by Wilson & Son on said dock.

Large quantities of this lard had gone forward to Antwerp in Antwerp ships, consigned by Bors to his correspondents in Antwerp. On April 1st, Wilson & Son received from Bors the following memorandun :

MEMORANDUM—CHRISTIAN BORS, 18 EXCHANGE PLACE.

New York, April 1st, 1876.

To Messrs. Wilson & Son.

"The agents of the Antwerp Steamer inform me "that they want to know the exact quantity of "lard you will ship in all, as they have an offer for "the balance of freight room. Please let us know "how much you will ship. My Antwerp friends ad- "vise the sale of your first lot of lard ; quality "satisfactory."

About the time of this memorandum Wilson saw Bors who urged him to get ready all the lard he possibly could; he said he would take 1,000 tierces if he could get them. On the 8th day of April Wilson delivered the 135 tierces in question on the dock, took the ship's receipt therefor as above stated with the weighmaster's return, and went to Bors' office in New York,and delivering the receipts and returns, demanded his advances; this was on a Saturday about half past two o'clock. Bors' book-

keeper said that Mr. Bors had been taken suddenly sick and wished Wilson to wait until Monday morning. He said to Wilson, "Come in on Monday morning at 11 o'clock promptly, and you shall have your check." On Monday morning he again went to the office and found Bors, who then told him that the lard was not what it ought to be, that it was watered and he should not make any advances. Bors not only refused to make any advances, but he also refused to re-deliver the lard to Wilson (fols. 69 to 77; 117 and 118). Bors said to Wilson, "If you will pay me back all my advances upon all the lard I have made advances for you, it may be sold on the other side for your account."

Wilson demanded his advances on the 135 tierces of lard, and on Bors refusing to make the advance he demanded the re-delivery of the lard.

Bors' claim that the lard had been watered, was based upon a telegram received from Antwerp, and related to prior shipments (fols. 227 and 230). There was no claim at the time, and no proof on the trial that the lard in question was watered (fols. 141, 142 and 143).

According to the evidence of the witness Preston, Bors demanded as a condition of returning this lard that he should be repaid all the advances he had made including the advances made on lard theretofore shipped to Antwerp, saying that he must protect himself and his friends abroad (fols. 117, 118, 220, 221).

Bors' only knowledge that the lard was adulterated with water at the time, was a cablegram he had received from Antwerp.

"He told me about a cable that he had received "of the lard that had arrived out; that that was "what was creating the fuss and not the lard that "was here (fols. 142, 143, 218)."

The vessel did not sail until April 15.

The defendant in error having advanced largely to Wilson & Son to enable them to purchase the lard in question, Wilson & Son assigned the claim to the defendant in error who brought this action, in consideration of one dollar and the indebtedness due from them to him (fol. 55).

POINT FIRST.

The Circuit Court has jurisdiction in cases against foreign consuls.

Bixby vs. Jansen, *et al.* 6 Blatch., 315.
Graham vs. Stucken, 4 Blatch., 50.
St. Lukes Hospital vs. Barclay, 3 Blatch., 259.

If it be thought that these authorities do not lay down the rule that the Circuit Court has jurisdiction in cases against foreign consuls by reason of their official character exclusively, they nevertheless sufficiently establish the law to be that where the Circuit Court has jurisdiction of a cause through the parties being citizens of different States, or the one a citizen of this country and the other an alien, that jurisdiction will not be ousted or destroyed because one of such parties chance, to be a foreign consul.

POINT SECOND.

The Circuit Court acquired jurisdiction against the plaintiff in error as an alien, by virtue of the first undisputed allegation of the complaint, which sets forth that the defendant in error is a citizen of the State of New York, while the plaintiff in error

is Consul for the Kingdom of Norway and Sweden, residing in the City of New York (fol. 6).

A consul for a foreign country discharging his duties in an American seaport is, in the absence of any contrary evidence, to be presumed in law to be an alien and a citizen or subject of the country which he represents.

I.

This presumption arises from the nature of his office, and the character of the duties he is called upon to discharge.

Says Vattell, Book 2, Chap. 2, Sec. 34: "The "consul being charged with the affairs of his sov- "ereign continues accountable for his actions and "subject to him. His functions require that he be "not a subject of the State where he resides, as then "he would be obliged in all things to conform to its "orders, and thus not be at liberty to acquit him- "self of the duties of his post."

Consuls are termed by Mr. Webster and Mr. Wheaton "official protectors of the commercial rights and interests of their fellow subjects in a foreign country."

The Bello Corrunes, 6 Wheaton. at 161.

In the same case it is said by this Court "On the "first point made by the Attorney General this "Court feels no difficulty in deciding that a Vice "Consul duly recognized by our government, is a "competent party to assert or defend the rights of "property of the individuals of his nation in any "Court having jurisdiction of causes affected by "the application of international law. To watch "over the rights and interests of their subjects,

"wherever the pursuits of commerce may draw "them or the vicissitudes of human affairs may "force them, is the great object for which consuls "are deputed by their sovereigns; and in a country "where laws govern and justice is sought for in "Courts only it would be a mockery to preclude "them from the only avenue through which their "course lies to the end of their mission. The long "and universal usage of the Courts of the United "States has sanctioned the exercise of this right, "and it is impossible that any evil or inconvenience "can flow from it. Whether the powers of the "Vice Consul shall in any instance extend to the "right to receive in his *national character* the pro-"ceeds of property libeled and transferred into "the registry of a Court, is a question resting on "other principles."

From the origin of the office, a consul has been regarded as the officer and agent of the country by which he has been appointed.

1 Kent, (7th Ed.) 49, and authorities cited.

His duties are to attend to all the commercial interests of that country arising in his consulate; to protect therein the property and champion the rights of the merchants and people of his nation; to look especially after the rights of seamen sailing under his flag, and in most instances to arbitrate on disputes between them and their masters; to administer upon the estate of subjects of the government he represents dying within his consulate and, in some instances, he possesses what is termed a consular jurisdiction with the judicial power to try and determine all disputes between merchants and all other persons belonging to the nationality he represents, and in whatever capacity he acts he observes and applies the laws not of the country in

which he resides but of the country which he represents.

See Kent's Commentaries, *supra.*

In the discharge of these duties the consul not merely stands presumptively in a relation of allegiance to the country he represents but he must necessarily at times act adversely to the people and government where he resides.

This presumption is strengthened and rendered more obvious in the case of the plaintiff in error by the terms of the treaty between this country and the Kingdom of Sweden and Norway, which he represents.

In this treaty each government stipulates for the protection and assistance of the consuls it shall appoint and that such consuls shall have "the right " to sit as judges and arbitrators between the cap- " tains and crews of the vessels belonging to the na- " tion whose interests are committed to their charge " without the interference of the local authorities," and that the archives and documents relative to the affairs of the consulate shall be exempt from search and shall be carefully preserved under the seals of the consulate

Art. XIII. Treaty of July 4, 1827.
Treaties and Conventions, Ex. Doc. No. 36,
41st Congress, Senate, 3d session.

And in a previous treaty it was provided that in case of illegal or improper conduct by a consul in respect to the laws or government of the country to which they are sent, the said consul may be punished or sent away by the offended government, that government assigning to the other the reasons therefor.

In speaking of the privileges or immunities enjoyed by consul this Court, in Davis vs. Packard, *et al*, 7 Peters, at 284, says: "If this was to be "viewed merely as a personal privilege, there "might be grounds for such a conclusion, but it "cannot be so considered. It is the privilege of the "country or government which the consul repre- "sents. This is the light in which foreign minis- "ters are considered by the law of nations, and our "constitution and law seem to put consuls on the "same footing in this respect.

"If the privilege and exemption was merely per- "sonal, it can hardly be supposed that it would "have been thought a matter sufficiently important "to require a special provision in the constitution "and laws of the United States. Higher consider- "ations of public policy doubtless led to the provis- "ion. It was deemed fit and proper that the Courts "of the government with which rested the regula- "tion of all foreign intercourse, should have cogni- "zance of suits against the representatives of such "foreign governments. That it is not considered a "personal privilege in England, is evident from "what fell from Lord Ellenborough in the case of "*Marshall vs. Critico*, 9 East., 447. It was a mo- "tion to discharge the defendant from arrest on "common bail on the ground of his privilege under "the Statute 7, and Ch. 12, as being Consul General "from the Porte. Lord Ellenborough said, this "is not a privilege of the person, but of the State "he represents; and the defendant having been di- "vested of the character, in which he claims that "privilege, there is no reason why he should not "be subject to process as other persons, and the "motion was denied on this ground.

"Nor is the omission to plead the privilege "deemed a waiver in England, as is clearly to be

" inferred from cases where application has been " made to discharge the party from execution, on " the ground of privilege under the Statute of Ann " which is considered merely as declaratory of the " law of nations; and no objection appears to have " been made, that the privilege was not pleaded. 3 " Burr, 1478, 1676."

It is not intended by the point here advanced, to assert that a foreign consul is in point of fact necessarily a subject or citizen of the country he repsesents, or that his national character is to be determined by his office irrespective of the facts and circumstances of his life which may lead to a contrary conclusion, or that his character and liability as a merchant or private person in the place where he resides is to be governed or affected by his official position, but it is insisted, upon a question of pleading and averment, that the fact that a person is a consul for a foreign government, in view of the nature of his office, the functions it involves, and the duties with which he is charged, raises a presumption in law, or makes out a *prima facie* case in fact, that such person is an alien in the country where he resides and a subject or citizen of the country he represents.

Or to state the position from another standpoint,

POINT THIRD.

Where it is alleged by the plaintiff in his complaint as the only matter giving jurisdiction to the Circuit Court that the defendant is a foreign consul, and the defendant answers and goes to trial and

raises no objection or question as to the jurisdiction of the Court until after he is defeated, and the cause has been brought into this Court, it will be presumed, in the absence of any testimony in the record to the contrary, that the defendant was an alien; because the natural presumption of his alienage is established by his failure to assert the contrary when such an assertion would have deprived the Court of jurisdiction and relieved him from the trouble and expense of litigation.

Express Co. vs. Kountze Bro., 8 Wallace, 342, at 351.
Marshall vs. Baltimore & Ohio R. R. Co., 16 How, 314, at 329,

In Express Co. vs. Kountze Bro., this Court says: "It is said if cases of a Federal character were properly transferable to the Circuit Court, this was "not one of them; because it does not appear that "the suit was between citizens of different States. "It is true there is no direct averment to this effect "but it is the necessary consequence of the facts "stated in the pleadings, that the parties to the "suit were citizens of different States. The aver- "ment that the plaintiffs were a firm of natural "persons associated together for the purpose of "carrying on the banking business in Omaha, and "had been for a period of eighteen months engaged "in said business at said place, is equivalent to "saying they had their domicile there. In this "country people usually live and have their citizen- "ship in the place where they do business. Espe- "cially is this true of persons engaged in a business "requiring capital, and involving risk, at a point "which is remote from the great centres of trade "and commerce.

"The citizenship of the defendant is clearly

"enough averred. It is alleged that the United "States Express Company, the defendant in the "suit, is a foreign corporation formed under and "created by the laws of the State of New York. "The obvious meaning of this allegation is that the "defendant is a citizen of the State of New York. "The course of proceeding in the Court below "shows that the parties to the suit recognized it as "being of Federal jurisdiction, and it could only be "so (as there was no Federal question involved), "on the ground that the plaintiffs and defendant "were citizens of different States. If the parties "had thought otherwise, after the cause reached "the Circuit Court, the point would have been "taken and an effort made at least to test the jur- "isdictional question. The record shows that "nothing of the sort was attempted."

In Marshall vs Baltimore & Ohio R. R. Co. upon the point of whether, looking behind the corporate name of the defendant, the allegation that such defendant was a "body corporate by the act of the General Assembly of Maryland," contained a sufficient averment that the persons composing such corporation were citizens of Maryland, this Conrt says:

"Whether the averments of this fact be sufficient "in law, is merely a question of pleading. *If the* "*declaration sets forth facts from which the citi* "*zenship of the parties may be presumed or legal-* "*ly inferred, it is sufficient.* The presumption "arising from the habitat of a corporation in the "place of its creation, being conclusive as to the "residence or citizenship of those who use the "corporate name, and exercise the faculties con- "ferred by it, the allegation that the 'defendants "are a body corporate by the act of the General "Assembly of Maryland,' is a sufficient averment

" that the real defendants are citizens of that State. " * * * * * * In the case of Gassies vs. Bal- " lou, 6 Pet., 761, the petition alleged that 'the de- " fendant had caused himself to be naturalized an " American citizen, and that he was at the time of " filing the petition residing in the parish of West " Baton Rouge.' This was held to be a sufficient " averment that he was a citizen of the State of " Louisiana. And the Court say, 'a citizen of the " United States residing in any State of the Union, " is a citizen of that State. They also express " their regret that previous decisions of this Court " had gone so far in narrowing and limiting the " rights conferred by this article of the Constitu- " tion."

The opinion of the Court in Gassies vs. Ballou, 6 Peters, 761, is as follows :

Marshall, Ch. J.:

"In this case the Court is of opinion that the " jurisdiction can be sustained. The defendant in " error is alleged in the proceedings to be a citizen " of the United States, naturalized in Louisiana, " and residing there. This is equivalent to an aver- " ment that he is a citizen of that State. A citizen " of the United States, residing in any State of the " Union, is a citizen of that State. The authorities " on this question have gone far enough ; and this " Court is not disposed to narrow any more the " limitations which have been imposed by the de- " cided cases. They have gone as far as it would " be reasonable and proper to go. The judgment of " the District Court of Louisiana is affirmed."

These authorities clearly show that where the averment sets forth facts from which the citizenship or alienage may be legally inferred, it is sufficient.

We insist, in the language of Judge Grier, that the allegation that the plaintiff in error "is consul for the Kingdom of Norway and Sweden" is a declaration setting forth a fact from which the alienage of the plaintiff can be presumed or legally inferred, and is therefore sufficient; and likewise we insist in the language of Judge Davis "that the course of proceeding in the Court below shows that the parties to the suit recognized it as being of Federal jurisdiction, and it could only be so (as there was no Federal question involved). on the ground," if the contention of the plaintiff in error be correct, "that such plaintiff was (in point of fact) an alien. If the plaintiff was not an alien the point would have been taken and an effort made at least to test the jurisdictional question."

It is true that this Court has held the rule above presented inapplicable to averments which set forth only the bare fact of the residence of a natural person.

In Robertson vs. Cease, 7 Otto. 646, and in Brown v. Keene, 8 Peters, 115, & Grace v. Amer. Cent. Ins. Co. not yet reported, where nothing was averred except that the person resided in a particular State, this averment was held insufficient to establish the fact that such person was a citizen of that State, the fact of citizenship being essential to give jurisdiction.

The distinction between these two lines of authority is obvious.

In the case of a private person where nothing but his naked residence is given, the Court has no means of arriving at the fact of his citizenship, and that fact must in such a case be distinctly averred, and cannot be argumentatively inferred.

But in the case of a corporation or of a public officer the fact of citizenship may appear with sufficient certainty, in the absence of a distinct averment, as matter of legal cognizance.

Thus it has been held that a corporation is in law a citizen of the State where it has been created.

Thus, too, in the case even of a natural person, it is held that where the fact of residence in a given State is accompanied with an allegation that such person is a citizen of the United States, the Court will presume him to be a citizen of the State where he resides.

Gassies vs. Ballou, *supra.*
Express Co. vs. Kountze Bro., *supra.*

So in the case of a foreign consul, it being a fair presumption of international law that he is a subject or citizen of the nation he represents, that fact will be assumed by the Courts from an averment of his official character, especially when such averment is followed on his part by an acquiescence in a jurisdiction which could not otherwise obtain.

POINT FOURTH.

The assignments of error in the record do not contain any mention of a want of jurisdiction in the Circuit Court, and it may not therefore be now considered. (See fols. 262 *et seq*).

POINT FIFTH.

If it should be held by this Court that the Circuit Court had not jurisdiction then as this Court possesses, itself, original jurisdiction in the case by virtue of an express provision in the Constitution of

the United States and in the Judiciary Act, this Court will. in furtherance of justice, issue a *venire de novo* and try the cause now and here.

Or, as in Robertson vs. Cease, *supra*, leave to amend will be accorded the defendant in error, that he may distinctly set out the alienage of the plaintiff in error at the time of the commencement of the action ,*nunc pro tunc*, and irrespective of any statute of limitations.

POINT SIXTH.

Trover was the proper remedy.

The lard was delivered at the dock alongside the ship upon the condition that the advance should be made on delivery and on presentation of the ship's receipts and weighmaster's returns.

Bors' having refused to pay on presentation of the ship's receipt and weighmaster's returns he acquired no right to the possession of the lard.

By refusing to return the lard, and by refusing to deliver over the shipping receipts, and by having subsequently made out and caused bills of lading to be signed by the captain (fol. 145) for these very goods, Bors exercised a control over the property of Wilson & Son, which amounted to a conversion.

Bank of Rochester vs. Jones, 4 N. Y., 497.
Cayuga County Nat. Bank vs. Daniels, 47 N. Y., 631.
First Nat. Bank of Cairo vs. Crocker, 111 Mass., 163.
Allen vs. Williams, 12 Pick., 297.
Jones on Pledges, Secs. 268, 269, and cases there cited.

There was no evidence that the 135 tierces of lard in question were watered.

The samples Nos. 1, 2 and 3, analyzed by the chemist, were not shown to be samples taken from the 135 tierces. The evidence showed directly the contrary.

The samples analyzed were in Bors' office as early as March 28th, and the 135 tierces were not delivered on the dock until April 8th, and could not be sampled before that time.

Indeed it appears that the only evidence that Bors had that the lard contained water was information received by cablegram on the morning of April 8th. which related to other lard then in Antwerp by previous shipments.

But however much the 135 tierces may have been watered, it is clear that the defendant could not retain the lard and refuse to make the advances.

The ship remained in port seven days after the delivery of the lard and there was ample time to return.

Having recceived the lard upon the condition that he was to make the advance he had no property in the lard until the advance was actually made, and his shipping it, and not returning it, rendered him liable.

POINT SEVENTH.

The judgment should be affirmed with costs.

B. F. TRACY,
Of Counsel for Defendant in Error.